Supreme Court, U.S.
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No. 06-879

IN THE

Supreme Court of the United States

WAYNE RITCHIE,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent,

- and -

ROBERT V. LASHBROOK, in his individual and in his official capacities; IKE FELDMAN, in his individual and official capacities,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. a. Does the Ninth Circuit have the power to effectively repeal Rule 52(c) of the Federal Rules of Civil Procedure by deleting the text "judgment as a matter of law" in violation of this Court's holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) that the federal courts are not free to amend a rule outside the process Congress ordered?

b. Does the text "judgment as a matter of law" in Rule 52(c) for a bench trial – like that same text in Rule 50(a) for a jury trial – require that all reasonable inferences be given to the nonmoving party?

2. a. Did the district court, with the Court of Appeals' *sub silentio* approval, err as a matter of law in granting a conclusive favorable, but unreasonable, inference to the government which won the case for it, namely, that because Ritchie could not place Feldman, of the Federal Bureau of Narcotics, working for the CIA, at the party, then the obvious inference was that Feldman was not there and could not have put LSD in Ritchie's drink even though Feldman made a series of incriminating admissions that he personally drugged Ritchie with LSD?

b. Did the lower courts err as a matter of law in holding that Ritchie failed to prove his case by a preponderance of the evidence where those courts only speculated and failed to cite a scintilla of evidence to support findings on administering LSD and on causation and, further where the only evidence - - including a "series of incriminating" admissions by Feldman (as found by the Court of Appeals) - - proved the LSD drugging of petitioner and causation by an overwhelming

preponderance of evidence at the close of petitioner's case in chief?

3. Did the lower courts abuse their discretion, as defined in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), by refusing to impose preclusive sanctions where the district court found the government's central witness, Feldman, had repeatedly lied on his depositions on the key issues in the case and the court sanctioned the government's attorney and respondent because they interfered with, and obstructed, Feldman's deposition and, further where the undisputed evidence proved that the government attorney suborned Feldman's perjury and then with the knowledge of that perjury, cited it to the court to defeat petitioner's motion for summary judgment?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully petition for a Writ of Certiorari to review the June 26, 2006 judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion entered on June 26, 2006 unanimously affirmed the grant of respondent's Rule 52(c) motion for judgment as a matter of law at the close of petitioner's case in chief under Federal Tort Claims Act, 28 U.S.C.§2674. 1a. A petition for rehearing and en banc were denied on October 18, 2006. 15a.

On July 5, 2005, the United States District Court for the Northern District of California, San Francisco Division, entered a final judgment pursuant to Federal Rules of Civil Procedure, 52(c) granting the government's motion for judgment as a matter of law and entered findings of fact and conclusions of law. 16a.

On January 5, 2005, the district court granted sanctions under Rule 30(d)(3) against AUSA Kenney and the respondent for obstructing Ritchie's lawyer's second deposition of Feldman and awarded Ritchie his attorney fees and costs for the second Feldman deposition. 57a. However, the court denied petitioner's principle request for sanctions - - to strike respondent's answer. 42a. The sanctions motion was based on the court's previous finding that Feldman had lied during his first deposition and into the early part of the second deposition. Ritchie contended that AUSA Kenney had suborned Feldman's perjury and — knowing that Feldman had lied — had nonetheless used Feldman's perjured testimony in opposition to the summary judgment motion and thereby practiced a fraud on the court.

On June 6, 2005 the trial court denied respondent's and AUSA Kenney's motion to vacate the sanctions order

entered against them. 39a. Petitioner waived a monetary award for attorneys' fees and costs in order to have a final, appealable judgment.

On May 24, 2004, the district court denied both parties' motions for summary judgment, finding that there were genuine issues to be tried. 66a. The district court found, *inter alia,* that Ira Feldman and George White were engaged in the involuntary drugging of unwitting subjects in San Francisco on behalf of the CIA under its MKULTRA project.

On July 1, 2002 the district court denied respondent's motion to dismiss or in the alternative for summary judgment. 94a.

On July 12, 2001 the lower court dismissed the *Bivens* claims against Ike Feldman and Robert Lashbrook under California's statute of limitations that the action was brought more than one year after petitioner, Wayne Ritchie, learned of his injury and its cause. 114a.

On April 5 through April 8, 2005 petitioner presented its case in chief in a bench trial. Respondent's motion for a judgment as a matter of law under Rule 52(c) was granted by an oral opinion on April 8 and a written opinion, after briefing, on partial findings of fact and conclusions of law on July 5, 2005. The district court refused to give any reasonable inferences to petitioner under Rule 52(c) for a "judgment as a matter of law" and instead gave a conclusive favorable, but unreasonable, inference to the government that won the case for it.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1). Subject matter jurisdiction in the district court was based on 28 U.S.C.§1331, for claims under the Federal Tort Claims Act, 28 U.S.C.§2674, §2680 (k) et seq.

STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Federal Tort Claims Act, 28 U.S.C. §2674, in pertinent part, is set forth in the Appendix, 269a.

Federal Rule 50(a) of Civil Procedure entitled Judgment as a Matter of Law in Jury Trials . . . is set forth in the Appendix, 269a.

Federal Rule 52 of Civil Procedure entitled Findings by the Court; Judgment on Partial Findings

(a) Effect

(c) Judgment on Partial Findings

is set forth in the Appendix, 270-271a.

Federal Rule 52(c)'s predecessor, Rule 41(b) is set forth in the Appendix, 271a.

STATEMENT

It is undisputed that from 1955, the Central Intelligence Agency ("CIA") was engaged in the testing of LSD and other psychoactive drugs on unwitting subjects in a safe-house, at bars and other places where people normally eat and drink in San Francisco. 17a.[1] The CIA subproject was specifically geared to drugging victims with LSD without their knowledge or consent. That operation was known as Subproject 42 and was under the supervision of George White, who was the director of the Federal Bureau of Narcotics ("FBN") in San Francisco. Ira Feldman was a group supervisor under White at the FBN and carried out LSD druggings under White's direction on behalf of the CIA. Wayne A. Ritchie, the petitioner and a deputy U.S. Marshal at the time, claims that he became one of the unwitting victims of this bizarre government program when a federal narcotics agent slipped some LSD into his drink at a Christmas party in the Post Office Building in San Francisco on December 20, 1957.

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[1] References to the Appendix are to "_a". Emphasis supplied throughout unless otherwise noted.

After consuming some food and drinks at the party, Ritchie had classic symptoms of LSD and ultimately retrieved his two guns and attempted to hold up the Shady Grove Bar. He was knocked unconscious, arrested, spent the night in jail and resigned from the Marshal's service. He was subsequently given a suspended sentence. Ritchie was never told that he was drugged. In 1999, when reading the obituary of the CIA's Dr. Sidney Gottlieb, Ritchie learned of the CIA's LSD dosing of hundreds of Americans and it suddenly came to him that was what had happened to him over forty years earlier. That analysis was later confirmed when he read the December 20, 1957 entry in George White's diary referring to "home flu - xmas party fed bldg press room". 175a. Ritchie concluded that that was the party at which he was drugged. Armed with his new knowledge, he timely filed his administrative claim with the CIA and DEA (formerly Federal Bureau of Narcotics) and after denial, timely brought suit under the Federal Tort Claims Act.

Ritchie had a four-day bench trial before the Honorable Marilyn Hall Patel commencing on April 5, 2005. The parties **stipulated** for the trial that Ritchie "suffered a brief psychotic episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove Bar" (131a, No. 18). The parties further agreed that the two liability issues were (1) "whether Wayne Ritchie was an LSD victim of the CIA's or FBN's drugging program?" and (2) "whether Ritchie's alleged drugging with LSD was the cause of his psychotic episode?" 127a.

Plaintiff's case-in-chief consisted of live testimony from Ritchie and his psychiatric expert, Dr. James S. Ketchum. Ritchie also relied principally on the deposition testimony of Ira Feldman (254a-257a), the central witness in the case and other evidence.

After plaintiff's case-in-chief, the defendant moved for judgment as a matter of law under Rule 52(c) asserting only that petitioner failed to prove a prima facie case that LSD caused Ritchie's brief psychotic episode. 167a. Significantly, the respondent stated that "for purposes of the standard before the Court now, we ... would admit that a reasonable juror could find, as Your Honor found in the summary judgment order, that ... Feldman's statements in his deposition could have been an admission" that Feldman administered LSD to Ritchie. Id. The district court rejected respondent's admission. Thus, that caused respondent in its brief to argue that Feldman did not drug Ritchie with LSD, notwithstanding its initial concession. Ritchie asserted that the district court, as fact finder, had exceeded its authority when it rejected respondent's admission. After briefing, the district court directed that a judgment be entered dismissing the case as a matter of law and made findings of fact and conclusions of law pursuant to Rule 52(c) on the ground that Ritchie did not prove by a preponderance of the evidence that someone administered LSD to him, that a federal agent administered LSD to him or that LSD caused Ritchie to rob the Shady Grove Bar.

The district court also exceeded its authority when it failed to accept the stipulated fact that "[p]laintiff suffered a brief psychotic episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove Bar". 131a.[2] The remaining issue in dispute was whether Ritchie's LSD drugging was the cause of his brief psychotic episode?

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[2] That stipulated fact was based on the lower court's finding on the summary judgment motions that "[b]oth sides agree further that plaintiff suffered a brief psychotic episode on the night of December 20, 1957, that resulted in his attempted robbery of the Shady Grove Bar". 69a.

A. The Evidence Relating to LSD

Dr. Sidney Gottlieb of the CIA "pointed out that LSD is quite capable of producing very strong mental derangement when used in amounts so small as to be unseeable and incapable of being tasted or smelled". 178a.

B. Ira Feldman's Deposition Testimony

Feldman testified at his second deposition on February 7, 2003 (254a-257a):

Q. Now, all these people that **you personally drugged**, you never did any follow-up on them, in the sense of telling them **that you had drugged them**, did you?

* * *

A. Not all the people that **I drugged.** I drugged guys involved in about ten, twelve, period. I didn't do any follow-up, period, because it wasn't a very good thing to go and say "How do you feel today?". You don't give them a tip. You just back away and let them worry, **like this nitwit, Ritchie**.

Q. When you say "let them worry", you mean let them have a **head full of LSD**...

A. Let them have a **full head [of LSD] like what happened, like what happened with this nut [Ritchie]** when he got out and got drunk.

* * *

Feldman then testified about negotiating with White on White's choice of intended victims.

Q. So you have a distinct recollection of doing that negotiation?

A. Oh, absolutely I have a recollection.

Q. And you negotiated with White and you said "Maybe not this guy. Let's do it to this guy"?

A. Same thing, right. Absolutely.

Q. So you were in on the decision process.

A. Of course I was in on the decision process.

Q. So you were essentially deciding who was going to suffer and who was not going to suffer.

A. I didn't say anybody had suffered. I didn't say anybody suffered. **The bird, like this guy [Ritchie], who saw snakes coming out, he deserved to suffer**.. . .

Feldman testified people would have trouble walking and would become suicidal. 258a. Ritchie had these same reactions.

C. Daniel P. Casey's Deposition Testimony

Daniel Casey was a federal narcotics agent and group supervisor, like Feldman, who worked for White, the district supervisor in San Francisco.

Casey read the December 22, 1957 San Francisco Chronicle article "Good Guy Fails as Bad Guy" about Ritchie's attempted holdup of a bar, and knowing Ritchie from booking prisoners, Casey's reaction was, "I was shocked because he appeared to be "a decent fellow". 272a. Casey's testimony also established the fact that at least one other agent by the name of Jim Mulgannon was involved in the White-Feldman drugging operation. 27 2a.

D. District Court's Pre-Trial Findings

In its Memorandums & Orders (entered May 24, 2004 and January 5, 2005), the district court found:

Ritchie's actions on the night of December 20, 1957, were completely out of character. 75a. "Feldman appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge and consent. Feldman gives this indication three times, though each reference is somewhat oblique". 73a. First: as to the guys that he personally drugged, Feldman "didn't do any follow-up", you "don't give them a tip, you just back away and let them worry like this nitwit, Ritchie." 73a.. Feldman "appeared to inculpate himself in Ritchie's drugging a second time" when he testified "Let them have a full head [of LSD], like what happened, like what happened *with this nut when he got out and got drunk. "* Id. Feldman was asked (*id.*) "if he were essentially 'deciding who was going to suffer', and

implicitly referenced Ritchie a third time, replying that I didn't say anybody suffered. *The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone.* (original emphasis).

The district court further found, 78a-79a:

"Ira Feldman, the admitted CIA operative and one-time MKULTRA participant, stands at the very center of this case . . . On multiple separate occasions during his first and second depositions Feldman denied - under direct questioning - that he had participated in any drugging of Ritchie, or indeed that he had ever before seen or interacted with Ritchie. However, during his first deposition Feldman denied *ever administering drugs to unwitting [subjects]*, a denial that Feldman himself and others have since convincingly refuted..... Like the thirteenth chime of a broken clock, the demonstrably incorrect statements in Feldman's first deposition cast doubt upon all those that preceded them. However, Feldman's denials at the beginning of his second deposition are no more equivocal. At the beginning of Feldman's second deposition, plaintiff's counsel showed Feldman a transcript of an interview that Feldman had given in which he admitted to having administered LSD to numerous non consenting individuals . . .. Confronted with this evidence, Feldman lacked a compelling reason **to continue to lie** about his involvement with MKULTRA and could hardly perpetuate his denials with any semblance of credibility."

* * *

"Each of plaintiff's various allegations of fraud on the court ultimately traces back to the contradictory and **apparently perjured testimony of Ira Feldman.** As noted above, Feldman's testimony at his first and second depositions was rife with contradictions concerning his involvement in Project MKULTRA. . . . These mutually

inconsistent statements provide ample evidence to support plaintiff's assertion **that Feldman lied under oath**." 149a.

On respondent's motion for summary judgment and based on all of Dr. James Ketchum's (Ritchie's psychiatric expert) reports that were submitted in opposition - which are in evidence here, 180a-227a - the district court held (93a): "Furthermore, plaintiff's expert's reasoning simply does not contain any prominent, dispositive logical gaps that defendant's expert can exploit. Dr. Ketchum has come to a well -- reasoned, coherent conclusion -- one that defendant's experts reasonably dispute, to be sure, but one that is not plainly incorrect or misinformed. . . . It remains only for this court to ascertain whether a reasonable jury could legitimately find for plaintiff on the issue of causation given the evidence presented, and on that account the court is satisfied that plaintiff's expert has made a sufficient showing to enable a reasonable jury to hold in its favor." Id. at 248.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit, In An *Ultra Vires* Act, Did The Equivalent Of Repealing Rule 52(c) By Effectively Deleting "Judgment As A Matter Of Law" From Its Text To Give It The Same Meaning As Its Predecessor, Rule 41(b), In Violation Of This Court's Holding In *Amchem Products, Inc., v. Windsor,* 521 U.S. 591, 620 (1997) That "Courts Are Not Free To Amend A Rule Outside The Process Congress Ordered"

Rule 52(c) of the Federal Rules of Civil Procedure, effective December 1, 1991, provides that in a bench trial where the court finds against a party on an issue upon which he has been fully heard, the court may enter a "judgment as a matter of law" against that party on a claim that requires a favorable finding on that issue. Significantly, Rule 41(b), Rule 52(c)'s predecessor, did not contain the text "judgment as a matter of law."

Here, the Ninth Circuit, by not giving any meaning whatsoever to the phrase "judgment as a matter of law", effectively repealed Rule 52(c). Indeed, to compound its error, the Ninth Circuit's decision is also inappropriately based on a 1990 decision - - *ante* Rule 52(c)'s amendment on December 1, 1991 - - in *Lytel v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990) which construed the pre-existing Rule 41(b) as not requiring the grant of favorable inferences to the nonmoving party. 7a, n. 7. In sharp contrast, petitioner relies on the current Rule 52(c) with the explicit text "judgment as a matter of law" and this Court's 2000 decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), which defined the provision "judgment as a matter of law" under Rule 50(a) relating to jury trials as requiring the drawing of all reasonable inferences in favor of the nonmoving party.

The Ninth Circuit ignored petitioner's citation to *Reeves* even though it was decided after *Lytel* and after the 1991 amendment. *Reeves* held that "the standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that 'the inquiry under each is the same' . . . in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw **all** reasonable inferences in favor of the nonmoving party . . . " *Reeves*, 530 U.S. at 150.

Here, the district court *sub silentio* denied Ritchie's claim that Rule 52(c) required that all reasonable inferences be drawn in favor of the nonmoving party. The Court of Appeals affirmed and acknowledged that its interpretation of the "phrase 'judgment as a matter of law' appears in both Rule 50(a) and Rule 52(c) [and] may be **confusing**, but it is not dispositive" and that "the standard for entering judgment as a matter of law differs under each of these rules." 7a, n.7.

But the appeals court did not assign any importance to the fact that Rule 41(b) was replaced by Rule 52(c) with the phrase "judgment as a matter of law." By not giving any meaning to that text that court effectively deleted it from Rule 52(c). Thus, reliance on Rule 41(b) without the phrase "as a matter of law" in *Lytel* is irrelevant to the meaning of current Rule 52(c) with that phrase.

The Ninth Circuit recognized that the text "judgment as a matter of law" in Rule 50(a) for jury trials requires that all favorable inferences be given to the nonmoving party. 7a, n. 7. But the Court of Appeals does not attempt to show why the standard for "judgment as a matter of law" in both Rule 50(a) and 52(c) should differ. Indeed, the advisory committee's note to the 1991 amendment of Rule 52 states "Subdivision (c) is added. It **parallels** the Revised Rule 50(a), but is applicable to non-jury trials." A side by side review of Rule 52(c) and Rule 50(a) demonstrates their essential sameness when it comes to "judgment as a matter of law", except that Rule 52(c) applies to a bench trial.[3]

It necessarily follows that this Court's rationale in *Reeves,* decided with reference to a "judgment as a matter of law" under Rule 50(a), applies equally to a motion for

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[3] In addition, Rule 52(c) requires that a "judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule." It is also noteworthy that by effectively eliminating "as a matter of law" from Rule 52(c), the Court of Appeals in substance made that rule very much like Rule 52(a), which is applicable to bench trials after the close of all the evidence. Accordingly, inasmuch as the Ninth Circuit did not distinguish between a dismissal at the close of plaintiff's case in chief and a dismissal after both parties have submitted all of their evidence, it has subverted the purpose of Rule 52(c).

"judgment as a matter of law" under Rule 52(c) and requires that all reasonable inferences be given to the nonmoving party, Ritchie.

Obviously, it is beyond the powers of the Court of Appeals to exercise a choice of the old Rule 41(b) over the current Rule 52(c) under *Amchem*. Indeed, it was *ultra vires* for the Ninth Circuit to make such a choice because the "text of a rule . . . limits judicial inventiveness." *Amchem Products, Inc.*, 521 U.S. at 620. *Amchem Products, Inc., id.*, held: "Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress . . . The text of a rule thus proposed and reviewed **limits judicial inventiveness.** Courts are not free to **amend** a rule outside the process Congress ordered . . ." As this Court held: "of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are **bound to enforce.**" Id. Thus, the Ninth Circuit violated the holding of *Amchem Products, Inc., supra,* by effectively amending Rule 52(c)'s text by deletion of the phrase "judgment as a matter of law."

Both lower courts erred in not giving all reasonable inferences to the nonmoving party, Ritchie, when they granted the government's motion for "judgment as a matter of law" under Rule 52(c). 36a. Once this Court holds that all reasonable inferences are required to be drawn in favor of the nonmoving party, Ritchie, under Rule 52(c), reversal is essential.

As is shown below, the overwhelming preponderance of evidence establishes that Feldman, a federal narcotics agent working for the CIA, administered LSD to petitioner Ritchie causing petitioner's brief psychotic episode that resulted in his attempted robbery of the Shady Grove Bar, *infra,* Point II.

A. If This Court Grants The Petition For A Writ Of Certiorari In *Lorraine G. Grace, et al. v. Bank Leumi Trust Company Of New York, et al.*, No. 06-608, Docketed On November 2, 2006, Then This Petition Should Be Granted Because Both Cases Have A Common Issue – That "Courts Are Not Free To Amend A Rule Outside The Process Congress Ordered" As Held In *Amchem Products, Inc.*, 521 U.S. at 620.

Petitioners in *Grace, et al.* cite (p.8-9) the same Supreme Court authority there, *Amchem Products, Inc.*, 521 U.S. at 620, as is cited here, to support the proposition that the Court of Appeals is not free to amend the civil rules. The arbitrary amendment of Rule 60(b) by the Second Circuit and effective repeal of Rule 52(c) by the Ninth Circuit dramatically demonstrate why the lower federal courts must be required to adhere to deeply rooted principles of law, like in *Amchem,* lest our government of laws be replaced by elastic holdings which erode the integrity of our judicial system. That is a central reason why this petition and the one in *Grace* should be granted.

If the petition in *Grace* is granted, then this petition should be granted. Independently, even if the petition is denied in *Grace,* the petition in this matter should still be granted for the reasons stated herein.

B. Review Of A "Judgment As A Matter Of Law" Under Rule 52(c) Must Be *de novo;* It Was Error Of Law To Use The "Clearly Erroneous" Standard For Findings Of Fact Without Giving All Reasonable Inferences To The Nonmoving Party

Where the district court grants a motion for "judgment as a matter of law" as here, the Ninth Circuit requires a *de novo* review (*Crow v. Wiltel Communications Systems*, 103 F. 3d 1897, 1899 (9th Cir. 1996) (citing cases). The Ninth Circuit erroneously reviewed the district court's grant of a motion for "judgment as a matter of law" on partial findings of fact under Rule 52(c) as though review

was limited to the "clearly erroneous" standard under Rule 52(a) at the end of the entire case. If that was so, then the advisory note would have stated that 52(c) parallels 52(a). The note did not state that; it only stated that 52(c) parallels 50(a). Thus the Court of Appeals committed reversible error.

II. As A Matter Of Law, The Overwhelming Preponderance Of Evidence Established That Feldman Administered LSD To Ritchie Which Caused His Brief Psychotic Episode

Ritchie proved a "*prima facie*" case under this Court's cases of *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) and *Reeves*, 530 U.S. at 154. Inasmuch as petitioner's direct and circumstantial evidence was the only evidence presented, it established Ritchie's case by an overwhelming "preponderance of evidence."

A. All The Evidence Proves That Feldman Administered LSD To Ritchie

Feldman's undisputed triple admissions were unambiguous and prove he administered LSD to Ritchie. The Court of Appeals correctly found that Feldman made a "**series of incriminating** . . . statements about his role in the CIA's LSD project." 4a. It was more than one "incriminating" admission. It was a "series."

Feldman testified that of the people he "personally drugged," he "didn't do any follow-up," "You don't give them a tip. You just back away and let them worry, **like this nitwit, Ritchie**". 254a. Therefore, even though petitioner's attorney only asked about Feldman's follow up of the people he personally drugged, Feldman's answer explicitly volunteered the name Ritchie. Ritchie's attorney then asked "When you say 'let them worry', you mean let them have a head full of LSD" and Feldman answered. Id: **"Let them have a full head [of LSD] like what happened, like what happened with this nut [Ritchie] . . ."** Thus, Feldman twice referred explicitly to "like what

happened" here to this nut Ritchie who had a full head of LSD. When asked whether he was essentially deciding who was going to suffer, Feldman answered (256 - a): **"The bird, like this guy [Ritchie], who saw snakes coming out, he deserved to suffer."** That was Feldman's third "incriminating" admission.

The district court found in its order on petitioner's motion for sanctions (45a): "most significantly, Feldman . . . arguably admits to having personally administered LSD to plaintiff, directly contradicting a number of statements made at his first deposition." It also found that "Feldman appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge and consent" (73a) and detailed the above three times that Feldman "appeared to inculpate himself in Ritchie's drugging" (73a-74a summary judgment).

Feldman testified further that "absolutely I have a recollection" of negotiating with White and saying "Maybe not this guy. Let's do it to this guy". 256a. Feldman admitted: "Of course I was in on the decision process". 256a.[4].

Based on the above factual analysis, it was an error of law for the appeals court to hold that Feldman's admissions were "vague". 8a. Feldman's statements were

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[4] Feldman's incriminating admissions trumps the Ninth Circuit's unsupported speculation that "Feldman may have been lying to provoke defense (sic) counsel, trying to be funny, or simply speaking imprecisely when he made the purported admissions." 8a. When Feldman was confronted with an audiotape of an interview "in which he admitted to having administered LSD to numerous non consenting individuals . . . Feldman lacked a compelling reason **to continue to lie** about his involvement with MKULTRA and could hardly perpetuate his denials with any semblance of credibility" (79a summary judgment).

plain, unambiguous English. The Ninth Circuit acknowledged that Feldman "made a series of **incriminating**, contradictory and combative statements about his role in the CIA's LSD project". 4a. The cited record support for the "contradictory" testimony was explicitly found by the district court to be lies. 49a.[5] To give credence to Feldman's perjury to support the finding of "contradictory" testimony is an error of law. Also, the Ninth Circuit's finding violates the sacred principle of law that "[t]here is no point to a lawsuit, if it merely applies law to **lies**. True facts must be the foundation for any just result". *Valley Engineers Inc. v. Electric Engineering Co.*, 158 F. 3d 1051, 1056 (9th Cir. 1998). Indeed, Feldman's lies about a material fact is "affirmative evidence of guilt" *Reeves,* 530 U.S. at 147. Thus, the Ninth Circuit made a critical error of law in attempting to diminish Feldman's "series of incriminating" admissions that he personally drugged Ritchie.

White's December 20, 1957 diary entry was strong circumstantial evidence. It is evidence that the Christmas party in the press room of the Federal Building (the same as the Post Office Building) on December 20th was the targeted location for Ritchie's LSD drugging. "Feldman confirmed that White's illness would not have impeded his work; a planned LSD test would have taken place irrespective of whether or not White was sick and had to remain at home" (75a summary judgment order). Pursuant

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[5] Feldman's testimony, cited by the Court of Appeals (4a. n. 4) that he never slipped LSD to another person and that he never witnessed anybody slipping LSD to another person were found by the district court to be "lies". 49a and 79a. Moreover, the appeals court further erred in treating Feldman's "combative" testimony as though it detracted from Feldman's "series of incriminating" statements. 4a-5a, notes 3 and 5.

to the Senate Intelligence Committee's request of the CIA in about 1977, the CIA itself utilized White's diary as an important source for attempting to locate victims as it contained locations and dates of drug testing for victims. 259a.

After the trial, the district court and the Court of Appeals omitted all references to White's diary entry for December 20, 1957 thereby omitting a very important documentary link to Ritchie's proof of his drugging by a federal agent.

The Ninth Circuit also erred in holding that the "district court's determination that Ritchie did not prove Feldman's involvement is not clearly erroneous". 8a. Based on the cited evidence and all the reasonable inferences in favor of Ritchie as the nonmoving party under Rule 52(c), Ritchie has made a *prima facie* case and proved by an overwhelming preponderance of evidence that it was more likely than not that Feldman drugged Ritchie with LSD.

B. The District Court Explicitly Agreed With Petitioner's Expert's "Diagnosis That Ritchie's Symptoms Were Consistent With LSD Intoxication"

The district court explicitly found that it agreed with Dr. James Ketchum's, Ritchie's psychiatric expert's, differential "diagnosis that Ritchie's symptoms were consistent with LSD intoxication". 34a. It also found Ritchie's recollection of events is "largely undisputed" (17a) and "sincer[e]". 33a. But, the district court failed to even mention the parties all important stipulation that Ritchie "suffered a brief psychotic episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove Bar" (131a, No. 18)," and that Ritchie's "psychotic episode is tantamount to agreement that [Ritchie's] actions on the night of December 20,1957, were completely out of character" (75a summary judgment).

Therefore, the district court's finding, without citing to any record evidence, of "mild intoxication or some undiagnosed organic condition" as an explanation for Ritchie's symptoms is a complete non-sequitur that makes no sense. 33a. Dr. Ketchum's undisputed testimony explicitly rejected "any underlying neurological disease" or alcohol intoxication as an explanation for Ritchie's symptoms. 89a. Without citing any record evidence, the Court of Appeals' holding that the district court's finding was reasonable is another error of law. 7a.

C. The Panel Erred In Failing To Correct The Trial Court's Grant Of A Conclusive Inference In Favor Of The Government That Feldman Could Not Have Drugged Ritchie, Solely From Ritchie's Failure To Place Feldman At The Party; Without That Inference, There Was Zero Evidence To Support The Holding That Feldman Could Not Have Drugged Ritchie

Even though Ritchie explicitly raised it in his main brief, the Court of Appeals erred in failing to discuss Ritchie's claim that the trial court erred as a matter of law in granting a **conclusive** evidentiary inference to the government that Feldman was not at the party and could not have drugged Ritchie solely from Ritchie's failure to place Feldman at the party. 32a, 29a "conclusively". **That conclusive, but unreasonable, inference was the sole support for the district court's finding that Feldman did not drug Ritchie. Because the court considered it conclusive, it was critical to the government's victory.** Also, the district court's finding that Feldman was not at the party: (i) squarely conflicts with its own acknowledgement that Feldman "described Ritchie's behavior on the evening of December 20", 31a, (ii) conflicts with the Court of Appeals' reference to Feldman's "series of incriminating" admissions of personally drugging Ritchie (*supra)* and (iii) conflicts with the requirement that

all reasonable inferences be given to the nonmoving party, Ritchie, under Rule 52(c).

The district court acknowledged that an attorney's misconduct during a discovery deposition "may include drawing an adverse evidentiary inference against [AUSA's] client". 29a. Here it was an abuse of discretion for the district court to refuse to give Ritchie a favorable evidentiary inference based on the government's and AUSA's sanctioned misconduct during Feldman's second deposition.[6] Further, the district court compounded that error of law by then rewarding the sanctioned party by giving it a favorable conclusive inference that Feldman was not at the party and could not have drugged Ritchie. That is standing justice on its head.

The district court held that the "obdurate behavior" of AUSA Kenney during Feldman's second deposition "may well have denied plaintiff the opportunity to solicit further valuable testimony [from Feldman] (58a). . . . [c]ertainly Kenney's obstructionist tactics interfered with the flow of the deposition and the ability to obtain clear coherent answers [and] [m]uch of those tactics also afforded the opportunity to signal or slant the answers, thus distorting the statements of [Feldman] (59a-60a) [and the] . . . most notable interruption [came when Feldman] "appeared to be implicating himself in plaintiff's drugging" (63a, Endnote 2, detailing the interruptions). Indeed, AUSA's misconduct caused Feldman to clam up. 258a.

Under the circumstances, the Ninth Circuit erred in failing to discuss the grant of the conclusive inference to the government. Without that erroneous conclusive inference given to the government, there is nothing to

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[6] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) held: "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence".

support a finding that Feldman did not drug Ritchie. A finding without any support in the record is an error of law.

D. The Ninth Circuit Effectively Decided The Issue Of Causation For Ritchie By Holding That The District Court Acknowledged That Ritchie's Behavior Is Consistent With An LSD Induced Psychotic Episode

Once it is established that Feldman drugged Ritchie with LSD, then it is a baby step to the inescapable, logical conclusion that LSD caused Ritchie's brief psychotic episode. The parties had agreed that a liability issue was "whether Ritchie's alleged drugging with LSD was the cause of his psychotic episode?" 127a.

The appeals court addressed that issue by stating that the district "court acknowledged that Ritchie's behavior may well have been consistent with an **LSD-induced psychotic episode . . .** 8a. [7] That acknowledgement requires a favorable finding for Ritchie on the issue of "causation", once it is found that Feldman drugged Ritchie with LSD.

Effectively, the district court vitiated the stipulation of the parties that "Ritchie suffered a brief psychotic

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[7] The district court qualified its acknowledgment with the following non-sequitur: "'[t]o take [this] inference . . . to its logical conclusion'" "would compel the court" "'to find that LSD intoxication is the likely cause of almost any unexplained and superficially inexplicable behavior'". 8a. That is plain wrong. Ritchie suffered a brief psychotic episode. There is no evidence to support the proposition that people who have "unexplained and superficially inexplicable behavior" also have a brief psychotic episode. It demonstrates the court's erroneous reasoning and is also inconsistent with the "parties' agreement that Ritchie experienced a psychotic episode which is tantamount to agreement that [Ritchie's] actions on the night of December 20, 1957, were completely out of character". 75a.

episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove Bar." 131a. In its findings after trial, the court ignored that stipulation and effectively rewrote it and held that "Ritchie has not established that it is more likely than not that LSD-induced psychotic disorder **caused him to attempt to rob the Shady Grove Bar**". 35a. But the parties had already eliminated that issue by stipulating that the psychotic episode **"resulted"** in his attempted robbery. **"Resulted"** is effectively the same as **"caused"** here. The appeals court erroneously adopted the trial court's blatant error of law.[8] 8a.[9] By changing the issue in its post-trial findings without giving petitioner an opportunity to be heard on that freshly minted issue, the district court committed a major error of law on a critical issue in the case.

The district court found that "the court is satisfied that plaintiff's expert [Dr. Ketchum] has made a sufficient showing [on the issue of **causation** of Ritchie's psychotic episode] to enable a reasonable jury to hold in its favor" (93a on summary judgment, 193a-218a). Significantly, the same four reports by Dr. Ketchum were also received in evidence at the trial. His testimony was undisputed. The courts below and the government have not cited any part of Dr. Ketchum's testimony, direct or cross, that effectively challenges his differential diagnosis. The district court's

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[8] Even though the Court of Appeals referenced the stipulation that "Ritchie 'suffered a brief psychotic episode on the night of December 20, 1957'" (5a, n. 6), it failed to discuss the critical remainder of the stipulation "that resulted in his attempted robbery of the Shady Grove Bar". Accordingly, the Ninth Circuit, by cropping the quote, erred in failing to give Ritchie the full benefit of the parties' stipulation and *sub silentio* adopted the district court's position.

grounds for disregarding Dr. Ketchum's expert opinion amount to circumlocution. 34a.

There is not a scintilla of evidence to support the district court's findings on the issue of causation, namely, that "Ritchie's behavior was caused by some organic failure, either alone or in combination with a modest amount of intoxication" or "it is **possible** that Ritchie's apparent lapse of judgment, was exactly what it appears to be. Dr Ketchum's testimony completely discounts these possibilities." 34a. Both lower courts cited no evidence to support those findings. They merely speculated as to the causation.

E. The District Court Erred As A Matter Of Law By Effectively Taking Control Of The Government's Defense

The government, with access to its client witness Feldman, wanted to proceed solely on the defense of "causation". 167a. But the district court rejected the government's strategy and its admission that a reasonable juror could find that Feldman's deposition statements are an admission that Feldman administered LSD to Ritchie. Id.[10] By so acting, the trial court exercised control over the government's defense and then found the opposite, namely, that Feldman could not have drugged Ritchie. That was an error of law.

It was also an error of law for the district court to effectively vitiate the parties' most important stipulation

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[10] In making its motion for judgment as a matter of law at the close of plaintiff's case in chief, the government stated that "for purposes of the standard before the Court now, we . . . would **admit** that a reasonable juror could find, as Your Honor found in the summary judgment order, that . . . Feldman's statements in his deposition could have been an admission" that Feldman administered LSD to Ritchie. 167a.

that Ritchie suffered a brief psychotic episode. Recognizing the danger to the government's defense posed by that stipulation, the district court – post trial – literally moved the goalposts back by imposing a new burden on petitioner that he had to prove that the LSD induced psychotic episode caused him to attempt to rob the bar, 35a.

III. As A Matter Of Law, The District Court's Finding Of Lies By The Government's Central Witness, Feldman, Required The Imposition Of Preclusive Sanctions; The Undisputed Evidence Proved That The Government Suborned Feldman's Perjury And Practiced A Fraud On The Court

The Court of Appeals failed to acknowledge that the decision in *Cooter & Gell,* 496 U.S. at 405, on abuse of discretion, governs sanctions review under the court's inherent powers.

A. The Court of Appeals *Sub Silentio* Approved The District Court's Erroneous Holding That Feldman's Perjury By Itself Cannot Be The Basis For Sanctions.

Feldman was a client of the Justice Department and was found by the district court to be the "singularly salient source of evidence" in the case. 84a. In two separate opinions, the district court found that Feldman committed perjury. On sanctions, it held "Feldman's testimony at his first and second depositions was rife with contradictions concerning his involvement in Project MK-ULTRA . . . [t]hese mutually inconsistent statements provide ample evidence to support plaintiff's assertion that Feldman **lied under oath**." 49a. On summary judgment, it found that when Feldman was confronted with an interview he had given, "Feldman lacked a compelling reason to **continue to lie** about his involvement with MK-ULTRA and could hardly perpetuate his denials with any semblance of credibility." (79a, detailing Feldman's lies). Despite its finding of Feldman's repeated perjury on the most critical issues, the district court erroneously held as a matter of law

that **perjury by itself cannot** be a "basis for entry of default judgment against the United States." 51a.

The petitioner asserted below that perjury "by itself" is the basis for the imposition of sanctions, citing *ABF Freight Systems, Inc., v. National Labor Relations Board,* 510 U.S. 317, 324 (1994) ("Perjury should be severely sanctioned in appropriate cases") and *United States v. Mandujano,* 425 U.S. 564, 576-578, 581-582 (1976) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings . . .[e]ffective restraints . . . are . . . imperative . . . [o]ur cases have consistently – indeed, without exception – allowed sanctions for false statements or perjury." The Court of Appeals failed to even mention petitioner's argument and *sub silentio* approved the district court's holding. That was certainly "an unseemly toleration of perjury in the course of adjudicative proceedings" by the lower courts here. *ABF Freight Systems, Inc.,* 510 U.S. at 327 (concurring opinion, Scalia, J.). Justice Scalia also stated that inaction with respect to perjury "undermines and dishonors the legal system - - undermines and dishonors the courts" (id. at 326).

The Ninth Circuit's "toleration" of Feldman's perjury must not be tolerated by this Court. The lower courts' decisions violated the sacred principle of law in *Valley Engineers Co., v. Electric Engineering Co.,* 158 F. 3d 1051, 1056 (9th Cir. 1998) that "[t]here is no point to a lawsuit if it merely applies the law to **lies**." The district court abused its discretion by not applying preclusive sanctions for Feldman's repeated perjury.

B. The Undisputed Evidence Established As A Matter Of Law That The Government Suborned Feldman's Perjury

The district court adopted an erroneous view of the law by holding that "nothing in Feldman's false testimony – **deliberately procured** or otherwise – 'threatens to

interfere with the rightful decision' of the instant case" and therefore the "entry of default judgment is not an appropriate remedy for any misconduct that may have been committed by the United States." 52a. Sanctions against the government must have teeth to be effective, otherwise it has an exclusive license to present perjured testimony, to suborn perjury and practice a fraud on the court.

The district court further held that while it is undisputed that "portions of Feldman's testimony were indeed false . . . plaintiff must prove not only that [AUSA] Kenney presented testimony that was in fact false, but also that she knew that Feldman was committing perjury before his depositions were taken." 128a. The holding in *Wyle v. R.J. Reynolds Industries, Inc.*,709 F.2d 585, 591 (9th Cir. 1983) demonstrates what constitutes knowledge, namely, that "deliberate ignorance constituted the equivalent of knowledge of the truth (one who is aware of a high probability of the existence of a fact but deliberately ignores the fact, is deemed to have knowledge of the fact)." That proposition is directly applicable to AUSA Kenney's knowledge at the time of Feldman's depositions on July 30, 2002 and February 7, 2003.

Before Feldman's first deposition, and certainly by his second, AUSA Kenney did know that Feldman was committing perjury. Even though Ira Feldman's quoted statements in the *Spin* magazine article were unsworn, nonetheless, it was clear that Feldman was an active participant under George White in the CIA's San Francisco LSD drugging program. 127a-147a.. Also, the book written by John Marks, *the CIA and Mind Control: The Search for the Manchurian Candidate,* was a highly reputed source of facts that established Feldman's

involvement. 159a-163a.[11]. Both were in AUSA Kenney's possession well before Feldman's first deposition on July 30, 2002.

In addition, the district court failed to mention other evidence cited by petitioner. On May 8, 2001, petitioner's attorney sent AUSA a video entitled "Mind Control Murder" which was aired by A & E in 1999 and contained, inter alia, an interview of Ike Feldman stating that the CIA believed it had a truth serum in LSD and "**[w]e tested these drugs** in bars, in restaurants, in so-called massage parlors, any place there was a drink and people were eating and drinking that's where the stuff was tested". 148a.

At the time of Feldman's second deposition on February 7, 2003, Ritchie had already taken the deposition of John Gittinger of the CIA on August 2, 2002 which established that in 1959, Feldman participated in the detailed planing, was physically present at, and did a follow-up and reported to Gittinger on David Rhodes' (of CIA) LSD drugging of Ruth Kelley in San Francisco. 157a-158a. From AUSA's presence at Gittinger's deposition, Kenney knew that Feldman's denials of any knowledge about participating in MKULTRA druggings in the early part of his second deposition were false. 79a.

The lower courts failed to even mention that cited Gittinger deposition. Also, well before the second deposition, AUSA had received a video from Ritchie's attorney of Richard Stratton's 1993 interview of Feldman in which Feldman stated "I would go to various bars, various massage parlors . . .I would give these [LSD]

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[11] The Spin magazine article quoted Feldman as stating that the LSD was just the tip of the iceberg and "[t]hat's what I was doing when I worked for George White and the CIA". 138a.

drugs to certain people [m]ost of the times the LSD drug had a very, very bad effect." 156a. Despite Kenney's knowledge before Feldman's second deposition, Feldman continued his lies in the early part of his second deposition. 79a.

Feldman admitted at his second deposition on more than one occasion that he personally drugged numerous individuals with LSD (79a, 232a-233a) and in three separate answers that he personally drugged Ritchie with LSD. 233a-235a. Later in that deposition AUSA suborned Feldman's perjury by having him deny that he personally gave LSD to anyone at a bar. 63a-65a, Endnote 1 and 4. Initially, the district court found "nothing improper" in AUSA soliciting Feldman's denial (54a), but in its findings of fact after trial, the district court found that it was "likely that [Feldman] did" personally drug persons with LSD at bars. 37a. Endnote 3. Clearly, Kenney suborned Feldman's perjury.

Feldman's first deposition also clearly and convincingly demonstrates that Kenney suborned Feldman's perjury in **Kenney's cross-examination.** In a leading question Kenney insisted that Feldman "**first heard** about the CIA and mind bending materials, such as LSD, ...when that information was published in the **'70s** in connection with Congressional hearings?" Feldman gave Ms. Kenney the lie she suborned; he said "Yes. That's about the time". TR. 297-298. That was a blatant lie and known by AUSA to be a lie at that time. Kenney had planned to elicit Feldman's perjury by discussing it with him "earlier [that] day". TR. 296.

Despite Feldman's obvious perjury and AUSA Kenney's suborning of that perjury during Feldman's first and second depositions, neither Kenney nor Feldman corrected the answers on both depositions.

Feldman's Declaration, Prepared By AUSA, Was Effectively Suborned Perjury

Feldman gave false testimony in his July 30, 2001 Declaration that he did not recognize plaintiff's name, that he had no knowledge of anyone being drugged on December 20, 1957 and that he had no reason to believe that anyone associated with the Federal Bureau of Narcotics drugged anyone at a Christmas party at any time. 154a-155a. By November 2003, the clear and convincing evidence established the perjury in the Declaration. 148a-152a, 156a-158a.

Respondent does not deny that its attorneys prepared Feldman's Declaration. Thus, Feldman's Declaration was suborned perjury. The Court of Appeals approved, *sub silentio*, the district court's failure to even discuss that detailed evidence in support of suborning perjury.

C. Knowing That Feldman Committed Perjury In His Depositions, AUSA Kenney and Respondent Cited It To The Court And Thus Practiced A Fraud On The Court

At the time of the government's opposition to petitioner's motion for partial summary judgment in November, 2003, respondent knew that Feldman's testimony were lies but nevertheless relied on it extensively and thus practiced a fraud on the court. The Court of Appeals failed to discuss Ritchie's argument that the government's November 7, 2003 opposition (261a-268a) knowingly put forth clearly false testimony of Feldman that (i) Feldman does not recall knowing Ritchie, (ii) Feldman did not attend the Christmas Party on December 20, 1957, (iii) most importantly, that "Mr. Feldman did not slip plaintiff LSD" and (iv) the government explicitly relied upon Feldman's blatantly false Declaration of July 30, 2001. 261a-262a.

The Ninth Circuit erred in not awarding preclusive sanctions against the government for its blatant bad faith misconduct - - of suborning perjury and practicing a fraud on the court - - established by clear, convincing and undisputed evidence combined with Feldman's perjury and AUSA's deliberate obstruction of Feldman's deposition as found by the district court.

D. A Court's Inherent Power Allows It To Impose Sanctions Against The United States

Preclusive sanctions may be imposed under a court's inherent powers. *Chambers v. Nasco,* 501 U.S. 32 (1991). Where the government has committed flagrant bad faith or willfulness – such as here – Rule 55(e) does not preclude the imposition of sanctions, especially at a later stage in the proceeding – as here – "which prevent[s] the government from presenting further evidence or otherwise augmenting the record." *Giampaoli v. Califano*, 628 F.2d 1190, 1194-1196 (9th Cir. 1980).

Therefore, here, inasmuch as plaintiff has presented its evidence on liability and damages at trial, the appropriate sanction is the striking of defendant's answer and the entry of a monetary judgment.

E. Petitioner Requests That This Court Award Damages To Ritchie

The parties stipulated that if liability is established that the amount of economic damages that Ritchie suffered for past and future loss of earnings and retirement is $1,276,959. 132a.

Ritchie proved non-economic damages of $10,723,041 under the FTCA for negligent supervision, invasion of privacy and intentional infliction of emotional distress. 128a. Ritchie's real non-economic injury was demonstrated by Dr. Ketchum's testimony. 218a-219a, 229a-230a. Dr. Ketchum diagnosed Ritchie as having suffered from PTSD (217a) as a result of the unwitting drugging and devastating life altering consequences that

resulted. Among many other symptoms and psychological injuries, Ritchie contemplated committing suicide immediately after the attempted hold up and approximately three times a week for the next six years. Ritchie, age 79, requests that this Court grant preclusive sanctions for the government's flagrant bad faith by striking its answer and awarding damages of $12,000,000.

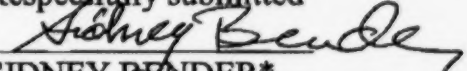
After the LSD drugging by the government's agent in 1957, Ritchie did not learn what happened to him and his true injury until 42 years later in 1999; that was followed by the Justice Department's presenting Feldman's perjured testimony, suborning that perjury and then knowing it was false citing it to the court, thereby practicing a fraud on the court. It also deliberately interfered with, and obstructed, Ritchie's lawyer's second deposition of Feldman. To compound that blatant misconduct, the lower courts in our judicial system have rewritten the facts and changed the law for this case. Ritchie respectfully requests justice in his lifetime, which is now. Final damages awarded him by this Court is appropriate justice.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
December 18, 2006

Respectfully submitted



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WAYNE RITCHIE, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA; ROBERT V. LASHBROOK, in his individual and official capacities; IRA FELDMAN, in his individual and official capacities, *Defendants-Appellees.*	No. 05-16401 D.C. No. CV-00-03940-MHP OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
May 18, 2006—San Francisco, California

Filed June 26, 2006

Before: Betty B. Fletcher, Alex Kozinski and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Kozinski

COUNSEL

Sidney Bender, Leventritt Lewittes & Bender, New York, New York, for the plaintiff-appellant.

Owen P. Martikan, Assistant United States Attorney, San Francisco, California, for the defendants-appellees.

OPINION

KOZINSKI, Circuit Judge:

We consider what inferences a district judge may draw, during a bench trial, in deciding a motion for judgment based on partial findings under Federal Rule of Civil Procedure 52(c).

Facts

On December 20, 1957, Wayne Ritchie, then a Deputy United States Marshal, attended a lunch-time Christmas party at the United States Post Office Building[1] in San Francisco. Ritchie drank a bourbon and soda, and then returned to his desk. Later that afternoon, with the party now in full swing, Ritchie took a break to down three or four more bourbon and sodas. When he returned to his office, he began to feel paranoid and worthless.

Ritchie left work early and went home. There, an unpleasant conversation with his live-in girlfriend from New York, who complained about living in San Francisco, drove him to leave the apartment in favor of the Vagabond Bar. He drank two more bourbon and sodas; his feelings of restlessness and paranoia continued. After about half an hour, he left the bar

[1]Now known as the James R. Browning United States Courthouse.

and began walking back to his office. As he walked, Ritchie hatched a plan to rob a bar so he could buy his unhappy girlfriend a plane ticket home to New York. According to Ritchie, he fully expected to get caught; in his paranoid state, he figured that the robbery would be an act of self-destruction.

Ritchie retrieved two guns from his storage locker at work and set out to put his plan into action. He decided to target the Shady Grove Bar. Once there, Ritchie ordered another bourbon and soda. After finishing his drink, Ritchie went up to the bartender, pulled out a gun and demanded money. A waitress came up behind him and asked Ritchie what he was doing. When Ritchie turned around, someone knocked him unconscious.

Ritchie awoke with two officers standing over him. As a result of his attempted robbery, he resigned from the Marshal's Office, pled guilty to attempted armed robbery, paid a $500 fine and was sentenced to five years probation. Obviously, these were the days before sentencing guidelines.

Fast forward forty-two years. In 1999, Ritchie read the newspaper obituary of Sidney Gottlieb, a doctor at the Central Intelligence Agency. *See* Obituary, *S. Gottlieb, directed mind-control tests*, *San Jose Mercury News*, Mar. 11, 1999, at 7B. From this article, Ritchie learned that the CIA had been administering LSD to unwitting subjects in the 1950s as part of a Cold War project to study its effects.[2] *See generally Kronisch* v. *United States*, 150 F.3d 112, 116-19 (2d Cir. 1998) (describing the CIA's drug-testing project). Based on this article, as well as his own independent research into the CIA's drugging activity, Ritchie concluded that the CIA had drugged him as part of a mind-control experiment. Ritchie brought a timely suit under the Federal Tort Claims Act

[2]The government admits that the CIA secretly tested LSD on U.S. citizens during the 1950s and 60s. The government disputes, however, that Ritchie was one of its subjects.

("FTCA"), 28 U.S.C. §§ 2671-2680, against the United States and its agents, claiming that his attempted robbery was set in motion when someone surreptitiously slipped LSD into his drinks at the 1957 Christmas party.

After denying the government's motion to dismiss, *Ritchie* v. *United States*, 210 F. Supp. 2d 1120, 1131 (N.D. Cal. 2002), and for summary judgment, the district court held a four-day bench trial. Ritchie presented two live witnesses during his case-in-chief: himself and a doctor who testified that LSD was the cause of Ritchie's attempted robbery of the Shady Grove. Ritchie also relied heavily on the deposition testimony of Ira "Ike" Feldman, a former agent involved with both the Federal Bureau of Narcotics and the CIA's surreptitious LSD-doping project, who made a series of incriminating,[3] contradictory[4] and combative[5] statements about his role in the CIA's LSD project.

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[3][Ritchie's attorney:] Now, all these people that you personally drugged, you never did any follow-up on them, in the sense of telling them that you had drugged them, did you?

[Government attorney:] Objection. Lacks foundation. Go ahead and answer it, if you can.

[Feldman:] Not all the people that I drugged. I drugged guys involved in about ten, twelve, period. I didn't do any follow-up, period, because it wasn't a very good thing to go and say "How do you feel today?" You don't give them a tip. You just back away and let them worry, like this nitwit, Ritchie.

[Ritchie's attorney:] When you say "let them worry," you mean let them have a head full of LSD and let—

[Feldman:] Let them have a full head, like what happened, like what happened with this nut when he got out and got drunk.

[4][Ritchie's attorney:] Mr. Feldman, did you ever witness anybody slipping LSD to another person?

[Feldman:] Never did.

[Ritchie's attorney:] Did you ever slip LSD to another person?

[Feldman:] Never did. Never did.

[5][Ritchie's attorney:] And were there ever prostitutes that you gave

At the close of Ritchie's case, the government moved for judgment as a matter of law, which the district court construed as a motion under Federal Rule of Civil Procedure 52(c) for judgment based on partial findings in a bench trial. The district court granted the government's motion, finding that (1) Ritchie had not proven that he was administered LSD by an agent of the federal government, or by anyone else, on December 20, 1957; and (2) Ritchie had therefore failed to prove that an *LSD-induced*[6] psychotic disorder caused his attempted robbery of the Shady Grove. The district court rejected Ritchie's arguments that he was entitled to a favorable evidentiary inference because the government destroyed files related to the CIA's drugging activity and that he should be granted preclusive sanctions based on government misconduct during Feldman's depositions. Instead, the district court awarded Ritchie "reasonable costs and attorneys' fees" incurred in taking Feldman's second deposition.

Jurisdiction

The government argues that we lack jurisdiction over Ritchie's appeal because the district court has yet to fix the amount of its monetary sanctions award and the judgment below is therefore not final. *See Kennedy* v. *Applause, Inc.*, 90 F.3d 1477, 1483 (9th Cir. 1996); *Jensen Elec. Co.* v. *Moore,*

[LSD] to to give to other people?

[Feldman:] I imagine there were. I don't remember what they were doing off times.

[Ritchie's attorney:] Didn't you have a great reputation as having a lot of whores?

[Feldman:] Whores, just like you too. You are a whore master, too. I was working for Uncle Sam. I was doing more than you were doing, Buster.

[6]The parties stipulate that Ritchie "suffered a brief psychotic episode on the night of December 20, 1957." They do not agree as to the cause of that episode.

Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1329 (9th Cir. 1989). But Ritchie has expressly waived his right to monetary sanctions based on the government's misconduct during Feldman's depositions, leaving nothing for the district court to decide. We have jurisdiction. *See* 28 U.S.C. § 1291.

Discussion

1. Ritchie argues that in ruling on a motion for judgment based on partial findings, *see* Fed. R. Civ. P. 52(c), the district court must draw all reasonable inferences in favor of the non-moving party. According to Ritchie, the standard for entering judgment on partial findings during a bench trial under Rule 52(c) is the same as for entering judgment as a matter of law during a jury trial under Federal Rule of Civil Procedure 50(a).

[1] Rules 50(a) and 52(c), however, assign very different functions to the district judge. Rule 50(a) provides that once a party has been fully heard on an issue during a *jury* trial, the court may grant a motion for judgment as a matter of law against the non-moving party only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). The rationale is obvious: During a jury trial, the jury—not the judge—is the trier of fact. Because the district judge lacks the authority to resolve disputed issues of fact under those circumstances, judgment as a matter of law is appropriate only if no reasonable jury could find for a party on that claim. This necessarily means that the court must draw all reasonable evidentiary inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." (ellipsis in original) (quoting *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962)) (internal quotation marks omitted)). When the jury is the trier of fact, judgment as a matter of law is appro-

priate only if no reasonable jury could find in favor of the non-moving party. *See id.*

[2] By contrast, a motion for judgment on partial findings under Rule 52(c) may be made only during a bench trial. Under Rule 52(c), "the court may enter judgment as a matter of law . . . with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Fed. R. Civ. P. 52(c). Rule 52(c) expressly authorizes the district judge to resolve disputed issues of fact. *See* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."). In deciding whether to enter judgment on partial findings under Rule 52(c), the district court is not required to draw any inferences in favor of the non-moving party; rather, the district court may make findings in accordance with its own view of the evidence.[7]

[3] Although Ritchie's behavior on December 20, 1957, may have been consistent with an LSD-induced psychotic episode, the district court reasonably found that "there are other plausible explanations for the symptoms that Ritchie described, including mild intoxication or some undiagnosed organic condition." The court concluded that it was "likely[ ] that Ritchie's behavior was caused by some organic factor,

[7]The Supreme Court has held with respect to Rule 52(c)'s predecessor that the district court need not give the non-moving party any favorable inferences. *See Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990) ("[A]lthough a court might, after reviewing the evidence, decide in favor of the party moving for a dismissal under Rule 41(b) [Rule 52(c)'s predecessor], that court might not take the same case away from the jury because it might believe that the jury could *reasonably* find for the non-moving party."); *see also* Fed. R. Civ. P. 52 advisory committee's note to 1991 amendment.

That the phrase "judgment as a matter of law" appears in both Rule 50(a) and Rule 52(c) may be confusing, but it is not dispositive. As described above, the standard for entering judgment as a matter of law differs under each of these rules.

either alone or in combination with a modest degree of alcohol intoxication. It is also possible that Ritchie's apparent lapse of judgment was exactly what it appears to be." Although the court acknowledged that Ritchie's behavior may well have been consistent with an LSD-induced psychotic episode, the court noted that "[t]o take [this] inference . . . to its logical conclusion" would compel the court "to find that LSD intoxication is the likely cause of almost any unexplained and superficially inexplicable behavior." The district court's finding that Ritchie did not carry his burden of proof is supported by the record.

[4] Although Feldman made a number of comments in his depositions suggesting that he was involved in drugging Ritchie, the district court's determination that Ritchie did not prove Feldman's involvement is not clearly erroneous. Feldman may have been lying to provoke defense counsel, trying to be funny, or simply speaking imprecisely when he made the purported admissions. Richie's lawyer asked no follow-up questions that might have elicited more detail about Feldman's vague assertions. Because Ritchie failed to prove he was drugged by the government (or by anybody else) on December 20, 1957, he has also failed to establish that the alleged drugging caused his misfortunes.[8]

[8]This is a troubling case. Ritchie filed suit over four decades after the events in question, and long after memories had grown stale, witnesses had died and potentially relevant files had been destroyed. Despite that, Ritchie has persevered for many years to vindicate his name, and to find some measure of peace with the events of December 20, 1957.

Although we affirm the judgment against Ritchie, we think it is quite possible that everything Ritchie says happened did happen—that Ritchie was drugged by his own government, and suffered great personal and financial hardships as a result. But, although it is *possible* that Ritchie was drugged, the district court's finding that he has not proved it is not clearly erroneous. Yet we know some people were drugged; the government admits as much. Ritchie's allegations of Cold War drugging by the CIA may thus be true, even though he could not prove them to the satisfaction of the district court. If Ritchie's claims are indeed true, he has paid a terrible price in the name of national security.

[5] 2. Ritchie claims that the district court erred in refusing to draw an adverse inference against the government from the fact that the CIA destroyed documents relating to its LSD experiments on unwitting victims. Parties should not be able to escape liability by destroying evidence of their own wrongdoing. The intentional destruction of evidence relevant to an issue at trial can therefore support an inference that the evidence would have been unfavorable to the party that destroyed the evidence. 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 291 (James H. Chadbourn rev. 1979).[9]

[6] This common law rule generally requires that the party seeking the adverse inference make a showing of relevance specific to the destroyed documents: The party must show that the document in question directly pertained to the disputed issue and could have supported its view of the facts. *See id.* at 228 (requiring "some evidence tending to show that *the document actually destroyed* or withheld is *the one* as to whose contents it is desired to draw an inference" (emphasis altered)). This standard makes sense when one party alleges that the other has caused a specific document to disappear, such as a contract or a deed. In this context, the parties to a dispute are usually both aware of the relevant paperwork, and can testify as to its contents. *Kronisch*, 150 F.3d at 128.

[7] The situation is different where one party destroys documents containing information gathered from unwitting subjects; in such circumstances, the subjects have no information as to the exact content of the destroyed documents. The destruction thus prevents the victims from obtaining the proof they need to support the adverse inference. Application of the strict common law requirements in such circumstances would

[9]The party requesting the inference must also show that the destroying party had an obligation not to destroy the evidence. The district court assumed without deciding that the government had such a duty here for the reasons articulated in *Kronisch*, 150 F.3d at 127, and the issue is not contested on appeal.

frustrate the adverse-inference rule and enable a party engaged in underhanded behavior to escape liability by regularly destroying documents.

[8] The Second Circuit confronted this conundrum in *Kronisch* and held that triers of fact must carefully consider whether the document destruction has made it more difficult for a party to prove that the documents destroyed were relevant. *Kronisch*, 150 F.3d at 128. If this is found to be the case, the burden on the party seeking the adverse inference is lower; the trier of fact may draw such an inference based even on a very slight showing that the documents are relevant. *Id.* We have cited *Kronisch* with approval, *see Med. Lab. Mgmt. Consultants* v. *Am. Broad. Cos.*, 306 F.3d 806, 825 (9th Cir. 2002), and to the extent we have not previously done so, we adopt the Second Circuit's careful and balanced approach for dealing with this difficult problem.[10]

[9] Ritchie's proof at trial would have been sufficient to permit the district court to draw an adverse inference under the *Kronisch* standard, had it chosen to do so.[11] *See* 150 F.3d

[10]In *Kronisch*, the issue was presented in a somewhat different procedural posture, as it came up during review of a summary judgment motion. 150 F.3d at 116. The court considered whether the plaintiff had presented proof that would be sufficient, if presented at trial, to support a jury inference that the destroyed documents could have supported plaintiff's case. *Id.* at 126. While our case arises much later in the proceedings, the inquiry is the same: Was the evidence sufficient to permit a trier of fact to draw an adverse inference against the defendant?

[11]The proof in both cases was highly tenuous. The victim in *Kronisch* had been served a drink in a Paris bar by a man with a club foot. Gottlieb, the head of the CIA's LSD project had a club foot and *could* have been in Paris at the time. 150 F.3d at 129 & n.12. Even though the government denied that it had conducted LSD experiments in Paris, or any experiments at all on U.S. citizens abroad, the Second Circuit nevertheless concluded that the plaintiff's evidence was sufficient to allow a trier of fact to draw an adverse inference against the government. *Id.* In our case, it is undisputed that LSD experiments on U.S. citizens were conducted in San Francisco. Ritchie's evidence linking the CIA with the events of December 20, 1957, was a diary entry on that date by George White, Feldman's superior, reading: "home flu—xmas party Fed bldg Press Room."

at 129. That is very different, however, from saying that the district court was *required* to draw an adverse inference against the government as to what the missing documents would have proven. The district judge here considered both the lack of direct evidence linking Ritchie's drugging with the destroyed documents and "the manifest weakness of the circumstantial evidence that Ritchie presented at trial." After evaluating the evidence Ritchie presented, the district judge determined that Ritchie was not entitled to a favorable evidentiary inference on the issue of liability. We cannot say that the district court was irrational in so concluding. *See Kronisch*, 150 F.3d at 129 (noting that despite surviving summary judgment, circumstantial evidence regarding proof of the documents "may prove to be altogether vulnerable at trial").

[10] 3. Ritchie argues that the district court should have entered judgment against the United States on the question of liability as a sanction for various discovery abuses. Ritchie's first claim is based on what he argues was the government's presentation of, and reliance on, what it knew was perjured testimony (that of Feldman). The district court, however, found that Ritchie had not carried his burden of showing that the lawyer representing the government had knowingly presented perjured testimony. Feldman had been quoted in two published sources making statements that were inconsistent with some of his deposition testimony. But the district court reasonably concluded that the government was not required to accept those earlier statements as true; rather, it was entitled to proceed on the assumption that Feldman had testified truthfully at his deposition. The district court's finding that Ritchie failed to prove by clear and convincing evidence that the government acted in bad faith in relying on Feldman's deposition testimony is supported by the record. *Phoceene Sous-Marine v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 n.13 (9th Cir. 1982) (noting that bad faith must be proven by clear and convincing evidence). Because no violation was found, the district court's decision not to impose sanctions was obviously not an abuse of discretion.

The district court did find that the lawyer representing the government had acted in an "obdurate" and "obstreperous" fashion during Ritchie's deposition, and this may well have interfered with Ritchie's ability to elicit helpful testimony from Feldman. While terming the government lawyer's conduct "unprofessional," the district court refused to sanction the United States by entering judgment against it on liability, finding such sanctions to be " 'grossly out of proportion' to the harm" Ritchie had suffered from the lawyer's conduct. Instead, the district court selected a remedy that it considered "more closely proportionate to the gravity" of the government's misconduct, namely, the payment of Ritchie's reasonable costs and expenses for taking Feldman's second deposition.

In reaching this conclusion, the court noted that Ritchie would not, ultimately, be prejudiced by the government's misconduct because "at trial, plaintiff's counsel will have the opportunity to ask the follow-up questions that Feldman managed to evade as a consequence of [the government's] misconduct." And, indeed, Feldman was originally listed as a witness on the parties' Joint Pre-Trial Statement. Subsequently, however, the statement was amended, and Feldman was removed from the live witness list and was listed, instead, as testifying by way of deposition. There is no explanation in the record for this change, and certainly no objection from plaintiff.[12] Nor did plaintiff request that the district court extend the discovery period and allow him to depose Feldman, yet again.

[12]In his reply brief before us, Ritchie suggest that he could not subpoena Feldman for trial, because he lived more than 100 miles away from the courthouse. *See* Fed. R. Civ. Pro. 45(b)(2). But this matter was not raised with the district court. Nor did Ritchie file a motion for reconsideration of the district court's discovery order, on grounds that the remedy the district court envisioned—questioning Feldman at trial—was not viable in light of plaintiff's inability to subpoena Feldman. Not having been raised below, at a time when the district court might have been able to deal with the problem, this argument is waived.

[11] District Courts have broad discretion in imposing discovery sanctions. *See Anheuser-Busch, Inc.* v. *Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995). Moreover, preclusive sanctions, such as dismissal of a case or entry of judgment against a party, are disfavored. *See United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 67 F.3d 242, 247-48 (9th Cir. 1995). When the district court chooses *not* to impose preclusive sanctions, and gives sound reasons for its actions—as the court did here—we must conclude that the court did not abuse its discretion.

4. Because we affirm on other grounds, we need not reach the government's alternative argument that the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193, bars Ritchie's claims under the FTCA.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

----------X

WAYNE RITCHIE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.

Defendants-Appellees.

----------X

No. 05-16401
D.C. No. CV-00-03940-MHP
Northern District of California, San Francisco
ORDER

Before: **B. FLETCHER, KOZINSKI and FISHER,** Circuit Judges.

Not later than 21 days from the date of filing of this order, appellees shall file a response to the petition for rehearing en banc.

Filed September 11, 2006
Cathy A. Catterson
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

----------X

WAYNE RITCHIE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.

Defendants-Appellees.

----------X

No. 05-16401
D.C. No. CV-00-03940-MHP
Northern District of California, San Francisco
ORDER

Before: **B. FLETCHER, KOZINSKI and FISHER,** Circuit Judges.

The petition for rehearing and the petition for rehearing en banc are denied.

Fed. R. App. P. 40; Fed. R. App. P. 35.

Filed October 18, 2006
Cathy A. Catterson
Clerk, U.S. Court of Appeals

Filed 07/05/2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
WAYNE A. RITCHIE,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant

No.COO-3940MHP

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Re: Motion for Judgment on Partial Findings

This action arises out of allegations that plaintiff Wayne A. Ritchie was a victim of a federal program that tested psychoactive drugs on unwitting subjects during the 1950s and 1960s. On April 6, 2005, a four-day bench trial commenced on Ritchie's claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C.§ 2671 et seq. Following the presentation of Ritchie's case-in-chief, the government moved for judgment as a matter of law, which the court construed as a motion for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c).[1] At that point, the court declined to hear additional testimony and gave the parties the opportunity to submit post-hearing memoranda regarding the government's motion. Having considered the parties' submissions and the testimony presented at trial, the court enters the following findings of fact and conclusions of law.

BACKGROUND

I. Facts

Plaintiff Wayne Ritchie is a former Deputy United States Marshal who worked at the United States Post Office Building in San Francisco, California in the mid-1950s.[2] Ritchie's claims against the United States arise from allegations that he was given food or drink laced with lysergic acid diethylamide ("LSD")

while he attended a Christmas party for federal employees held at the Post Office Building on December 20, 1957. Specifically, Ritchie contends that he is the victim of "Project MKULTRA," a Central Intelligence Agency ("CIA") program that was dedicated to the testing of LSD and other psychoactive drugs on unwitting subjects.

The existence of Project MKULTRA is now undisputed, and the government admits that CIA operatives in San Francisco were actively administering LSD to individuals without their knowledge or consent in December 1957. The project's San Francisco-based activities were carried out under the supervision of George White, an agent of the Federal Bureau of Narcotics who coordinated a CIA operation known as "Subproject 42" during the period from 1955 to 1963. Am. Joint Pretrial Statement, Undisputed Facts ¶¶ 21-22 (hereinafter "Undisputed Facts").As the director of Subproject 42, White established a safehouse apartment in San Francisco where CIA agents tested psychoactive drugs on prostitutes and their clients. Feb. 7, 2003 Dep. of Ira Feldman at 421-27 (hereinafter "Second Feldman Dep."). Ira Feldman, a supervisory group head at the federal Bureau of Narcotics, was among the agents who performed or supervised those testing activities. Undisputed Facts ¶ 22.

Ritchie's recollection of the events of December 20, 1957 is also largely undisputed. On that day, Ritchie reported to work at the Post Office Building and remained at his desk throughout the morning. Because of the upcoming Christmas holiday, most of Ritchie's co-workers at the Marshal's Office left work at approximately 12:00p.m. Id. ¶¶4,6; Tr. 50. At that time, Ritchie also briefly left his office to have lunch at the federal employees' Christmas party that was being held in the Press Room of the Post Office Building. Id. Upon arriving at the party, there were only three or four people present. Undisputed Facts ¶6. Ritchie stayed only briefly, having

something to eat and also having one drink, a bourbon and soda, before returning to his office at approximately 12:30 p.m. Id. ¶¶7-8.

Ritchie remained at his desk until approximately 2:00 p.m. Id. ¶8. At that time, Ritchie's supervisor, Jim Eagan, returned from lunch and suggested that Ritchie return to the Christmas party, which by then had grown to a size of approximately thirty to fifty people. Id ¶¶8-9. Ritchie took Eagan up on his suggestion and made a second appearance at the party, arriving soon alter Eagan's return and staying for approximately one hour. Id. ¶8, 10. During that time, he consumed three or four additional bourbon and sodas. Id. ¶8.

At approximately 3:00 p.m., Ritchie returned to his office. Id. ¶10. Sitting in his office alone, Ritchie soon began to experience what he has described as feelings of paranoia and worthlessness, which were accompanied by an intense urge to leave the building. Tr. 52-53. Ritchie acted upon this urge at approximately 4:30 p.m., locking the office and leaving work thirty minutes earlier than was his usual practice. Id at 53; Undisputed Facts ¶ 10.

Ritchie left his car at the Post Office Building parking lot and proceeded to walk home to his apartment on Ellis Street, where he was greeted by Dorothy McGinn. Undisputed Facts ¶ 11. McGinn and Ritchie had been living together for six months in December 1957, and the couple was married in April 1958. Id.¶ 2; Tr. 81. Prior to that time, McGinn had lived in New York City, and according to Ritchie, she rarely missed an opportunity to comment upon the ways in which San Francisco compared unfavorably to her former home. Tr. 54-55. Ritchie was greeted to one such diatribe when he returned home on the evening of December 20. Id. at 55, 177. For whatever reason, Ritchie found McGinnis' commentary on that occasion to be unusually grating, and he left the couples' apartment soon after he had arrived. Id. at 55. Undisputed

Facts ¶13.

Ritchie then proceeded to the Vagabond Bar, where he was a regular customer, and ordered two more drinks, again both bourbon and sodas. Id. However, Ritchie continued to experience feelings of restlessness, which he has characterized as shading into paranoia, and he left the bar approximately twenty- to-thirty-five minutes after he had arrived and began to walk toward his office. Tr. 56; Undisputed Facts ¶13. It was during his walk to the Post Office Building that Ritchie planned the armed robbery that he was
to attempt to carry out later that evening. Tr. 59. The inspiration for this plan remains uncertain, although Ritchie concedes that he was motivated by McGinn's desire to retum to New York and his intent to purchase a plane ticket that would permit her to do so. Undisputed Facts ¶ 14. Ritchie also testified that he planned the robbery fully expecting to be caught, imprisoned, and fired from his job at the Marshal's Office, but he explains that he was overcome by a sense of worthlessness that compelled him to engage knowingly in self-destructive conduct Tr. at 57-58; see also id. ¶14.

In the course of his walk, Ritchie stopped at three more bars before arriving at the Post Office Building, although he testified that he ordered only nonalcoholic beverages at each stop, Tr. 58-59. Upon his arrival, Ritchie removed two guns from his locker and retrieved his car from the Post Office Building's parking lot. Undisputed Facts ¶¶ 14-15. From there, he drove to the Fillmore District, which was at the time a heavily African-American neighborhood of San Francisco where Ritchie was certain that he would not be recognized. Id. ¶ 15; Tr. 59. When he reached Fillmore Street, Ritchie parked his car and walked into the nearest bar. Undisputed Facts ¶ 16; Tr. 59. However, upon seeing that there were no customers in the bar, Ritchie left immediately and sought

out another target, walking down the street to a second bar, the Shady Grove. Undisputed Facts ¶¶ 16-17. Ritchie entered the Shady Grove, sat down at one end of the bar, and ordered a bourbon and soda. Id. ¶ 17. After finishing his drink, Ritchie walked up to the serving station at the other end of the bar and demanded money from the bartender. Id. The bartender put cash on the counter, but Ritchie demanded more money. Id. At that point, a waitress approached Ritchie from behind and asked him what his was doing. Id. When Ritchie turned around, he was hit on the head and knocked unconscious. Id.

Ritchie was subsequently taken into custody and charged with attempted robbery with a deadly weapon. Id. ¶¶ 17, 20. He pleaded guilty to the offense charged, and on March 12, 1958, he was sentenced to five years probation and was ordered to pay a $500 fine, his sentence of imprisonment having been suspended by the court Id.¶ 20. Ritchie resigned from his position at the Marshal's Office immediately following his arrest Id.¶19.

It did not occur to Ritchie that his aberrant behavior on the evening of December 20, 1957 might have been caused by the ingestion of LSD until the late 1990s, when he learned of Project MKULTRA and other federal programs for testing psychoactive drugs on human subjects. Having been alerted to the possibility that he was a victim of Project MKULTRA, Ritchie filed Notices of Claim with the CIA and Drug Enforcement Agency ("DEA") on October 22, 1999. Those claims were denied on April 26, 2000, and the instant action followed.

II. Procedural History

A. Ritchie's Complaint

On October 25, 2000, Ritchie filed the instant action in this court, alleging that his criminal conduct on the night of December 20, 1957 was the product of LSD intoxication and asserting causes of action under the First, Fourth, Fifth, and Eighth Amendments of United States

Constitution as well as a claim under the FTCA. The court dismissed Ritchie's constitutional claims on July 12, 2000, holding that they were barred by California's one-year statute of limitations for personal injury actions. However, in its July 1, 2002 order, the court declined to dismiss Ritchie's FTCA claim, and the parties proceeded to adjudicate that claim on the merits, with Ritchie advancing the theory that a government agent introduced LSD into one of the drinks that he consumed during his second visit to the federal employees' Christmas party on December 20, 1957.

B. Summary Judgment

On May 24, 2004, the government moved for summary judgment on two issues related to proof of liability. The government first sought summary judgment on the issue of whether a government agent actually administered LSD to Ritchie on December 20, 1957. The second issue identified by the government's motion focused on what the parties referred to as "LSD causation" - i.e., whether ingesting LSD was the actual and proximate cause of Ritchie's attempted robbery of the Shady Grove Bar. Ritchie opposed that motion as to both issues and cross-moved for summary judgment on the question of whether he was administered LSD by a government agent without his knowledge or consent.

With respect to the first issue identified by the government's motion, Ritchie's attempt to meet his burden of proof on summary judgment relied heavily upon the testimony of Ira Feldman. As noted above, Feldman was a Bureau of Narcotics employee and San Francisco-based Project MKULTRA operative at the time that Ritchie's alleged drugging occurred. At the first of two depositions, Feldman categorically denied any involvement in administering LSD to Ritchie or to anyone else. However, after new evidence surfaced linking Feldman to Project MIKULTRA, the court permitted Ritchie's counsel to

depose Feldman again. During his second deposition, on February 7, 2003, Feldman recanted his earlier testimony denying his involvement in Project MIKULTRA and admitted that he participated in the program under George White's supervision. Second Feldman Dep. at 346-47, 360-63, 428-35. Feldman further testified that he had been involved in drugging non-consenting victims with LSD, admitting, *inter alia*, that Project MKULTRA agents administered LSD to unwitting victims in bars by slipping the drug into their drinks. Id. [3]

Feldman also testified regarding his knowledge of Ritchie's criminal conduct on the evening of December 20, 1957. Id. at 428-29, 435. In moving for summary judgment, Ritchie characterized this testimony as unambiguously implicating Feldman in Ritchie's drugging. However, the court disagreed, noting various inconsistencies in Feldman's testimony and the lack of any explicit admission from Feldman that be surreptitiously administered drugs to Ritchie or assisted another person in doing so. Order Re Mot. for Summary Judgment at 9-12 (May 24, 2004) (hereinafter "Summary Judgment Order"). Thus, observing that such testimony left it "in the position of essentially inferring facts from sideways comments, rather than from explicit testimony," the court held that Feldman's deposition testimony, while sufficient to create a genuine issue of material fact on the question of whether Ritchie was drugged by a government agent, fell well short of what was required to enter summary judgment in Ritchie's favor. Id. at 11-12.

With respect to the second, "LSD causation" issue raised by the government's motion, Ritchie's principal evidence proffered was then, as it is now, the testimony of Dr. James S. Ketchum, a psychiatrist who tested LSD and other psychoactive drugs on enlisted military personnel at Edgewood Arsenal, Maryland during his service as an officer in the United States Army "Chemical Corps." As

he relates in his expert report, Dr. Ketchum evaluated Ritchie using a "differential diagnosis" methodology, through which be sought to disaggregate the various causal factors that may have contributed to Ritchie's conduct on December 20, 1957. James S. Ketchum, Psychiatric Evaluation of Wayne Ritchie, at 8-20 (Dec. 5, 2001) (hereinafter "Ketchum Rep."). After examining Ritchie, Dr. Ketchum ruled out both alcohol intoxication and endogenous factors as likely explanations for Ritchie's behavior and concluded that LSD-induced temporary psychotic disorder was the only possible explanation for Ritchie's decision to hold up the Shady Grove Bar, Id. Contrasting this evidence with the conflicting opinions of two medical experts retained by the government, the court held that Dr. Ketchum's testimony was sufficient to create a triable issue of fact as to whether LSD intoxication caused Ritchie to attempt to commit armed robbery on December 20, 1957. Summary Judgment Motion at 17-18. Accordingly, the court denied both parties' motions for summary judgment in their entirety, Id. at 18, and Ritchie's FTCA claim proceeded to trial.

C. Trial

Beginning on April 6, 2005, the court held a four-day bench trial on Ritchie's FTCA claim. In presenting his case-in-chief, Ritchie called two live witnesses, himself and Dr. Ketchum. In addition, Ritchie relied on the deposition testimony of a number of witnesses who were unavailable to testify at trial, including various segments of Ira Feldman's deposition that he introduced for the purpose of establishing the government's involvement in his drugging. At the close of Ritchie's case-in-chief, the government moved to exclude Dr. Ketchum's testimony, asserting a number of grounds for disqualifying him as an expert under Daubert v. Merrell Dow Pharmaceuticals. Inc., 509 U.S. 579 (1993). In addition, the government moved for judgment as a matter of law, which the court

acknowledged to be a motion for judgment partial findings in a bench trial pursuant to Federal Rule of Civil Procedure 52(c).

Ruling from the bench, the court denied the government's Daubert motion, finding that Dr. Ketchum is qualified as an expert as to the effects as LSD on individuals. Tr. 671-72. The court nonetheless found that Dr. Ketchum's methodology for determining whether LSD caused Ritchie's behavior suffered from "a number of flaws," Id. at 672, and that in any event, the evidence that Ritchie was administered LSD by a government agent or by anyone else on December 20, 1957 was not sufficient to meet his burden of proof on that issue, Id. at 672-75. The court thus tentatively granted the government's motion for judgment on partial findings and permitted the parties to file post-trial memoranda for the purpose of addressing whether Ritchie had presented sufficient evidence to meet his burden of proving his FTCA claim.

Ritchie subsequently requested leave to file a supplemental memorandum in light of his failure to anticipate the arguments raised in the government's brief in support of its motion. The court granted that request and his (sic) since received supplemental memoranda from both parties. Thus, having received all of the relevant post-trial submissions, the government's motion for judgment on partial findings is now ripe for adjudication.

LEGAL STANDARD

> Federal Rule of Civil Procedure 52(c) states:
> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue....

Fed. R. Civ. P. 52(c). A judgment entered pursuant to Rule 52(c) must be supported by findings of fact and conclusions of law. Id. As with finding of fact made alter a completed bench trial, findings of fact made pursuant to Rule 52(c) are reviewed on appeal for clear error, the district court's legal conclusion are reviewed de novo. Dubner v. City & County of San Francisen 266 F.3d 959, 964 (9th Cir. 2001) (citations omitted).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The government's motion for judgment on partial findings requires the court to determine whether Ritchie can prove that he was unwittingly administered LSD by a federal agent on December 20, 1957 and that his reaction to the drug caused him to attempt to rob the Shady Grove Bar on that date. In resolving these issues, the court is required to set forth findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(c). However, before doing so, it must first address Ritchie's contention that he is entitled to a Favorable evidentiary inference on the issue of liability.

I. Ritchie's Entitlement to a Favorable Evidentiary Inference

A. The CIA's Destruction of Documents

As noted above, Ritchie argues that he should benefit from a favorable evidentiary inference on the issue of liability. The first basis he identifies for drawing such an inference is the CIA's destruction of files related to Project MKULTRA in 1973. Citing the findings of the report of the Senate Select Committee that investigated the CIA's testing of psychoactive substances on human subjects ("the Church Committee"), Ritchie asserts that the CIA intentionally destroyed Project MKULTRA-related documents in contravention of its own document-retention policy and that it did so for the purpose of precluding future claimants from obtaining

access to the documents. See. Final Report of the Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2d Sess. at 404 (Apr. 26, 1976) (hereinafter "Church Committee Report"). Ritchie thus urges the court to infer that the destroyed files must have included documents tending to establish that he was drugged by a CIA operative.

The court assumes without deciding that the government had a duty to preserve documents related to Project MKULTRA at the time that the project-related files were destroyed. That was the holding of the Second Circuit in Kronisch v. United States 150 F.3d 112 (2d Cir. 1998), appeal after remand 213 F.3d 626 (2d. Cir. 2000), cert. denied. 531 U.S. 1078 (2001), which, like the instant action, involved a claim that the CIA administered LSD to an unsuspecting individual in the 1950s. Id. at 116,127. This court has reason to doubt the wisdom of the Second Circuit's rejection on that issue. Nevertheless, as the Kronisch court recognized, the mere fact that a litigant has a duty to preserve evidence is not by itself sufficient to warrant inferring that the evidence destroyed would have been unfavorable to the party responsible for its destruction. Rather, the Second Circuit made clear that the party seeking to benefit from such an inference must make "some showing indicating that the destroyed evidence would have been relevant to the contested issue." Id. at 127 (citing Stanojev v. Ebasco Services. Inc. 643 F.2d 914, 923-24 (2d Cir.1981), and Skeete v. McKinsey & Co.. No. 91 Civ. 8093, 1993 WL 256659, at *7 (S.D.N.Y. July 7, 1993)). Thus, citing Wigmore's treatise, the Kronisch court concluded that a party seeking to draw an adverse inference from the destruction of a document must "first introduce some evidence tending to show that the document actually destroyed. . . is the one as to whose contents it is desired to draw an inference." Id. at 127-28 (quoting 2 John Henry Wigmore, Evidence

in Trials at Common Law, § 291, at 228 (James H. Chadbourn rev. 1979)) (original emphasis omitted) Kronisch was cited with approval by the Ninth Circuit in Medical Laboratory Management Consultants v. American Broadcasting Cos., 306 F.3d 806(9th Cir. 2002).See id. at 825 (quoting Kronisch 150 F.3d at 128) (original alterations omitted) (observing that "when a party has produced no evidence—or utterly inadequate evidence—in support of a given claim, the destruction of evidence, standing alone, is not enough to allow the party to survive summary judgment on that claim"). The rule that the Kronisch court adopted also comports with common sense; indeed, if no such showing were required, the finder of fact would be permitted to take the speculative assertions of the party seeking to benefit from the adverse inference at face value. Such a result would be contrary to the purpose of sanctioning the destruction of evidence, which is intended to "place the innocent party in the same position [that] he would have been in had the evidence not been destroyed." Kronisch, 150 F.3d at 127. Accordingly, the court finds the rule set forth in Kronisch to be apposite to the materially indistinguishable facts of the instant action.

That being the case, the procedural posture of this action differs from Kronisch, which came before the Second Circuit on appeal of the district court's order granting the defendants' motion for summary judgment See 150 F.3d at 120. In contrast, the plaintiff in the case at bar has survived summary judgment and now bears the burden of proving his claim to the finder of fact. This distinction is critically important, as Ritchie has now had the opportunity to present his case-in-chief at trial but has nonetheless failed to submit even a scintilla of evidence tending to establish that the CIA destroyed any documents pertaining to him, much less that it destroyed documents tending to show that he was drugged by a

government agent on December 20, 1957. This court simply cannot permit Ritchie to substitute speculation about what "must have" been in the CIA's Project MKULTRA-related files for facts tending to show that the files probably (or even possibly) contained evidence that would have proven his claim. This is particularly true in light of the manifest weakness of the circumstantial evidence that Ritchie presented at trial, which is discussed at length below. The court therefore finds that the CIA's destruction of Project MKULTRA-related files does not entitle Ritchie to a favorable evidentiary inference on the issue of liability.

B. Obstruction of the Second Feldman Deposition

Ritchie's second ground for urging the court to draw an inference in his favor on the issue of liability arises from the conduct of Assistant United States Attorney ("AUSA") Patricia Kenney during Ira Feldman's second deposition. In its January 5, 2005 order, the court found Kenney's "obdurate" behavior during that deposition to be sanctionable under Federal Rule of Civil Procedure 30(b)(3) and thus imposed monetary sanctions against Kenney and her client. Order Re Sanctions at 15-16 (January 5, 2005) (hereinafter "Sanctions Order"). Ritchie now argues that the court should also sanction Kenney's behavior by inferring that Feldman would have incriminated himself in Ritchie's drugging if counsel had been permitted to continue questioning him without interruption.

As the court noted in its January 2005 order, Rule 30(b)(3) permits the court to impose "an appropriate sanction" against any person responsible for frustrating the fair examination of a deponent. Fed. R. Civ. P 30(b)(3). The court also has the inherent authority to sanction discovery-related misconduct when that conduct interferes with "the orderly administration of justice and the integrity of the court's orders." Halaco Eng'g Co. v.

Costle 843 F.2d 376, 380 (9th Cit. 1988) (citing United States v. National Med. Enters, Inc., 792 F.2d 906, 912 (9th Cit. 1986)). Ultimately, the imposition of sanctions is left to the sound discretion of the court. Anheuser-Busch. Inc. v. Natural Beverages Distribs., 69 F.3d 337, 348(9th Cir. 1995) (citing Halaco 843 F.2d at 379). There is little doubt that under certain circumstances, sanctions for an attomey's misconduct during discovery may include drawing an adverse evidentiary inference against his or her client, C.F. Wyle v. R. J. Reynolds Indus. Inc. 709 F.2d 585, 589 (9th Cir. 1983) (noting that discovery abuses may lead to imposition of default judgment or preclusive sanctions under "extreme circumstances"). However, the court has already made it clear that such circumstances are not present here. As noted above, the court's January 2005 order found Kenney's behavior during Feldman's second deposition to be "obdurate" and "unprofessional." Sanctions Order at 15. Nevertheless, the court observed that the sanctions that Ritchie sought - establishing the liability element of his claim as a matter of law—were "grossly out of proportion" to the harm caused by Kenney's misconduct Id. Thus, while the court found it appropriate to impose less severe sanctions under Rule 30(b)(3), it refused to permit Ritchie to use Kenney's behavior "as an excuse to avoid his obligation to prove his prima facie claim for relief by presenting evidence at trial" and thus denied his request for preclusive sanctions. Id.

There is nothing in the record to suggest that a different conclusion is warranted with respect Ritchie's latest attempt to avoid his obligation to present evidence that would prove his claim. Indeed, whatever effect Kenney's misconduct might have had on Feldman's willingness to confess to administering LSD to Ritchie, Ritchie's own testimony, which is discussed below, conclusively, establishes that Feldman was not at the

federal employees' Christmas Party on December 20, 1957. Tr. 138; see also, Undisputed Facts ¶¶ 9, 23. In light of such uncontroverted evidence, it is wholly inappropriate to infer Feldman's involvement in Ritchie's drugging from a few ambiguous statements in his deposition testimony.[4] The court therefore rejects Ritchie's attempt to draw an evidentiary inference in his favor from Kenney's conduct during the second Feldman deposition.

II. Finding of Fact

Having concluded that Ritchie cannot rely on favorable evidentiary inferences to relieve himself of the burden of proving his claim, the court must now turn to the factual issues raised by the government's motion for judgment as matter of law. As noted above, that motion identifies two related factual determinations that the court must make in order to adjudge the government liable under the FTCA. First, the court must consider whether a federal agent administered LSD to Ritchie at the federal employees Christmas party held at the Post Office Building on December 20, 1957. If the court answers that question in the affirmative, it must then determine whether the ingestion of LSD caused Ritchie to attempt to rob the Shady Grove bar later that evening. To prevail under the FTCA, Ritchie must prove both the commission of the tortious act and the element of causation by a preponderance of the evidence.

The court first considers whether the evidence in the record establishes that Ritchie was drugged by a government agent at the federal employees' Christmas party that took place on December 20, 1957. As noted above, Ritchie's attendance at that party is not in doubt, nor is the fact that he consumed food and drink at the party. It is thus at least theoretically possible that someone could have laced that food or drink with LSD. Based on Dr. Ketchum's testimony regarding the

effects of LSD intoxication, this would have been most likely to have occurred during Ritchie's second appearance at the Christmas Party, at approximately 2:00p.m. on the afternoon of December 20. Tr. 471,483. However, among the thirty to fifty people who were in the Press Room at that time, Ritchie could not identify anyone as a likely Project MKULTRA operative. Indeed, it is particularly significant that Ritchie does not recall seeing Ira Feldman or George White at the party, both of whom he would have assuredly recognized on sight Tr. 138; Undisputed Facts ¶9,23. Accordingly, while it may be true that Ritchie did not know every person who was in attendance at the Christmas party,[5] his assertion that a Project MKULTRA agent must have been there and must have laced one of his drinks with LSD is purely speculative.

Nothing in Ira Feldman's deposition testimony is to the contrary. Feldman's description of Ritchie's behavior on the evening of December 20, while colorful, falls well short of an unambiguous admission of guilt.[6] As this court has previously observed, the passages from Feldman's deposition on which Ritchie relies can easily be characterize4 as a "needless and unfortunate comparison" of Ritchie's behavior with that of Feldman's victims rather as an admission that Ritchie was himself one of those victims. Summary Judgment Order at 10-11. The court has also already commented upon counsel's failure to make any attempt to clarify such ambiguity, observing:

> It is also noteworthy that on no occasion did plaintiffs counsel follow Feldman's allusions to Ritchie with more direct question designed to pin down precisely what Feldman intended to be saying. The absence of such questioning

> certainly does not eviscerate the potential veracity of plaintiff's observations regarding Feldman's admissions, but nonetheless it leaves this court in the position of essentially inferring facts from sideways comments, rather than explicit testimony.

Id. at 11 (endnotes omitted). As Feldman did not testify at trial, this observation applies with equal force here. Accordingly, Feldman's testimony would be entitled to little weight under the best of circumstances, and it certainly fails to overcome the obvious inference that can be drawn from Ritchie's testimony that he did not see Feldman at the party, that being that Feldman was not there and thus could not have put LSD in Ritchie's drink

This leaves Ritchie to rely on evidence that certain federal agents who lived and worked in San Francisco in December 1957 were administering LSD to unwitting victims and that some of those agents would have been invited to attend the federal employees' Christmas party on December 20 as the sole basis for inferring that a Project MKULTRA agent was present at the party and administered LSD to him there. However, there is nothing in the record that supports such a speculative inference. The court thus finds that Ritchie has failed to prove that he was drugged by a government agent on the date in question.

In fact, it is doubtful that Ritchie was unwittingly drugged by anyone on December 20, 1957. Admittedly, Ritchie testified to having a number of physical and psychological symptoms that could plausibly be characterized as reactions to LSD, including feelings of paranoia and restlessness, the blurring of his peripheral vision, and a sense that he was moving effortlessly as he walked home from the Post

Office Building on the evening of December 20. Tr. 52-54, 501. The court does not doubt the sincerity of Ritchie's testimony. At the same time, proper consideration must be given to the inevitable blurring of one's recollection with the passage of time, as well as to Ritchie's understandable desire to seek an explanation for his behavior on the evening of December 20, 1957 that would absolve him of responsibility for what he had for many years considered to be an unforgivable lapse of judgment. Thus, while it cannot be discounted entirely, Ritchie's testimony regarding the symptoms that he subjectively experienced after he left the Christmas party must be viewed with a healthy dose of skepticism.

Moreover, there are other plausible explanations for the symptoms that Ritchie described, including mild intoxication or some undiagnosed organic condition. The court is mindful that Dr. Ketchum opined that LSD-induced psychotic disorder is the sole possible explanation for Ritchie's conduct on the evening of December 20,1957. Id. at 308. Specifically, in performing his "differential diagnosis" of Ritchie, he ruled out alcohol intoxication or alcoholism as causes of Ritchie's criminal conduct. Id. at 309-10, 486-87. The court agrees that alcohol consumption was not likely to have been the sole factor that led Ritchie to attempt to rob the Shady Grove that evening. The record establishes that Ritchie was at the time a habitual drinker who drank to excess with occasional-to-moderate frequency, see generally id. at 166-70, but there is no evidence that he suffered from alcohol dependency. Moreover, although Ritchie had at least seven drinks over the course of the four-to-six hour period prior to the time that he attempted to rob the bar, his testimony is consistent with the relatively high tolerance for alcohol that one would suspect from a

habitual drinker.

Nevertheless, it is still possible, and the court believes likely, that Ritchie's behavior was caused by some organic factor, either alone or in combination with a modest degree of alcohol intoxication. It is also possible that Ritchie's apparent lapse of judgment was exactly what it appears to be. Dr. Ketchum's testimony completely discounts these possibilities. in so doing, he makes the leap from a diagnosis that Ritchie's symptoms were consistent with LSD intoxication (a point on which the court agrees) to the conclusion that Ritchie must have been given LSD at the Christmas party. However, while Dr. Ketchum went to great lengths to disabuse the court of the popularly held notion that users of LSD invariably experience the drug's "psychedelic" effects, see Id. at 261-23 (sic), the upshot of his testimony is that the effects of LSD ingestion vary widely with the amount of the dose, the circumstances under which the drug is taken and the user's mental state at the time he is given the drug. See, e.g. id. at 557 (observing that "perceptual distortions [caused by LSD ingestion] are so variable that it's almost impossible to list all of them"); Id. at 573 (discussing the effects of the setting under which LSD is consumed on the symptoms reported by the subjects of clinical testing). To take the inference that he draws from Ritchie's behavior to its logical conclusion, the court would be compelled to find that LSD intoxication is the likely cause of almost any unexplained and superficially inexplicable behavior. Such a finding would of course be erroneous, and so the premise upon which it is based is equally suspect. Yet that premise is precisely what the court would be required to believe to credit Dr. Ketchum's testimony on the issue of causation. The court therefore finds that his testimony is appropriately disregarded, and in any event

is not persuasive, to the extent that it seeks to establish a causal connection between the ingestion of LSD and Ritchie's criminal behavior on the evening of December 20, 1957.

Seeing that there is no other evidence that the ingestion of LSD caused Ritchie to commit attempted robbery on the evening of December 20, 1957, the court finds that Ritchie has not shown that he ingested LSD on that date, much less that he was drugged by a government agent without his knowledge or consent. It thus follows *a fortiori* that Ritchie has not established that it is more likely than not that LSD-induced psychotic disorder caused him to attempt to rob the Shady Grove Bar.

III. Conclusions of Law

The FTCA provides that "[t]he United States shall be liable, respecting the provision of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. Consequently, the federal government may generally be found liable for torts. including the type of personal injury claim asserted in the instant action, whenever liability could also be found with respect to a private actor. See Taghadomi v. United States, 401 F. 3d. 1080, 1083 (9th Cir. 2005). To prevail on his personal injury claim, Ritchie must prove by a preponderance of the evidence that he was given LSD by a government agent without his knowledge and consent on December 20, 1957 and that the ingestion of LSD caused him to attempt to rob the Shady Grove Bar later that evening.

Based on the findings of fact set forth above, it is clear that Ritchie cannot meet his burden of proof with respect to either of those elements of his claim.

Specifically, the court concludes that:

1. Ritchie has not proven that he was administered LSD by an agent of the federal government or by anyone else on December 20, 1957; and

2. Ritchie has not established by a preponderance of the evidence that his criminal conduct on the evening of December 20, 1957 was caused by LSD-induced psychotic disorder.

Accordingly, because Ritchie has been fully heard on each of these issues and an adverse finding as to either would be sufficient to defeat his claim under the FTCA, the court concludes it is appropriate to enter judgment as a matter of law pursuant to Federal Rule of Civil Procedure 52(c). The court therefore grants the government's motion for judgment on partial findings.

The foregoing findings of fact and conclusions of law are deemed the court's findings and conclusions pursuant to Rule 52(a). Any findings of fact contained in the conclusions shall be deemed findings of fact and any conclusions of law contained in the findings shall be deemed conclusions of law.

CONCLUSION

For the reasons stated above, the court GRANTS defendant's motion for judgment on partial findings. A judgment shall enter accordingly.

IT IS SO ORDERED.
Dated: July 5, 2005

/s/
MARILYN HALL PATEL
District Judge
United States District Court
Northern District of California

ENDNOTES

1. As the United States subsequently realized, Federal Rule of Civil Procedure 50, which governs motions for judgment as a matter of law, applies only to trials by jury. See Fed. R. Civ. P. 50. In a bench trial, Rule 52(c) sets the proper standard for moving for judgment on partial findings at the close of the plaintiff's case-in-chief. See Fed. R. Civ. P. 52(c).

2. The Post Office Building, located at the intersection of 7th and Mission Streets. now houses the United States Court of Appeals for the Ninth Circuit. In 1957, the building was occupied by this court.

3. Feldman's testimony is ambiguous as to whether he actually gave LSD to unwitting victims in bars himself. While on balance the court finds it likely that he did, that conclusion does not affect the outcome of these proceedings, which turns on whether Feldman (or some other, unidentified government agent) administered LSD to Ritchie without his knowledge and consent.

4. The justification for such an adverse inference is particularly weak in light of Feldman's advanced age and deteriorating physical condition, which were doubtlessly compounded by the characteristically incoherent examination style that Ritchie's counsel employed taking his deposition.

5. The court nonetheless notes that Ritchie testified that he "recognized most of [the people at the party] from working around the courts." Tr. 144.

6. As the court observed in its May 2004 order denying the parties' cross motions for summary judgment, there are three passages from Feldman's February 2003 deposition in which he arguably inculpates himself in Ritchie's drugging. In the first such passage, Feldman stated: "I drugged guys involved in about ten twelve, period. [sic]. I didn't do any follow-up, period, because it wasn't a very good thing to go and say

'How do you feel today?' You don't give them a tip. You just back away and let them worry like this nitwit, Ritchie." Second Feldman Dep. at 428. Following that statement, Feldman engaged in a colloquy with counsel in which he appeared to inculpate himself in Ritchie's drugging a second time:

Q. When you say 'let them worry,' you mean let them have a full head of LSD and let -

A. Let them have a full head, like what happened, like what happened with this nut when he got out and got drunk.

Id. at 428-29. Later, Feldman was asked if he were essentially "deciding who was going to suffer," and implicitly referenced Ritchie a third time, replying that:

> I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone.

Id. at 435.

Filed June 6, 2005
CAPTION
ORDER

On April 27, 2005, defendant moved to vacate the court's January 5, 2005 order imposing monetary sanctions on the United States and on Assistant United States Attorney ("AUSA") Patricia Kenney pursuant to Federal Rule of Civil Procedure 30(d)(3). In the alternative, defendant seeks leave to file a motion for reconsideration of that order pursuant to Civil Local Rule 7-9(b).

In the order that defendant now seeks to vacate, the court found that Kenney improperly employed obstructionist tactics in defending the deposition of Ira Feldman on February 7, 2003. While it concluded that this misconduct was not sufficiently egregious to warrant the sanctions sought by plaintiff – precluding defendant from presenting a defense on the issue of liability – the court nevertheless found that a less severe penalty was appropriate. The court thus imposed monetary sanctions on defendant and on Kenney, ordering each of them to pay one-half of the attorney's fees that plaintiff incurred in taking Feldman's February 2003 deposition.

In seeking to vacate that order, defendant argues that the court failed to give adequate notice before imposing sanctions under Rule 30(d)(3). It is of course true that a court may not sanction a litigant or an attorney *sua sponte* without first providing the target of the penalty an opportunity to show cause why sanctions should not be imposed. *Navelier v. Sletten*, 262 F. 3d 923, 943 (9th Cir. 2001) (citation omitted), cert. denied, 536 U.S. 941 (2002). However, what due process requires is notice of the possibility that sanctions may be imposed and an opportunity for the litigant or attorney to defend himself or herself against the allegations of misconduct. See *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F. 3d 1145,

1164-65 (9th Cir. 2003). While it may be true that plaintiff moved for sanctions pursuant to the court's inherent power rather then pursuant to Rule 30(d)(3), plaintiff's motion and defendant's opposition to that motion explicitly addressed the conduct that the court ultimately found to be sanctionable. That the court decided to impose a less severe penalty than that which was sought by plaintiff hardly prevented defendant or Kenney from vigorously defending themselves against the allegations of misconduct that were addressed in the January 2005 order. Accordingly, the court finds that defendant received all the process that was due prior to the court's decision to impose sanctions under Rule 30(d)(3). Defendant's motion to vacate the order imposing those sanctions must therefore be denied.

Alternatively, defendant requests leave to file a motion for reconsideration of the court's January 2005 order. This request is premised upon evidence that came to light during the April 2005 trial held in the instant action, which defendant characterizes as establishing conclusively that plaintiff suffered no prejudice from Kenney's misconduct. The court cannot accept this characterization of the trial record. Simply put, the prejudicial effort of Kenney's obdurate cannot be ascertained from the evidence presented at trial, just as it could not be determined based on the facts in the written record. In any event, the court has already made clear that its rationale for imposing sanctions was not premised upon the prejudicial effect of Kenney's misconduct, but rather upon the ethical impropriety of the conduct itself. Accordingly, defendant's suggestion that the court should reconsider its January 2005 order is not well taken. Its request for leave to file a motion for reconsideration of that order is therefore denied.

CONCLUSION

For the reason stated above, the court DENIES defendant's motion to vacate the court's January 5, 2005 order imposing sanctions upon it and upon AUSA Patricia Kenney and DENIES defendant's motion for leave to file a motion for reconsideration of that order.

IT IS SO ORDERED

Dated: June 6, 2005

/s/

MARILYN HALL PATEL
District Judge

Filed January 5, 2005

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C 00-3940 MHP

WAYNE A. RITCHIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM & ORDER

Re: Plaintiff's Motion for Sanctions

This action arises out of allegations that plaintiff Wayne Ritchie was a victim of a federal program to test psychoactive drugs on unknowing and unwitting individuals during the 1950s. Plaintiff's remaining causes of action seek relief under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., alleging that agents of the Central Intelligence Agency ("CIA") and the federal Bureau of Narcotics administered psychoactive drugs to him without his knowledge or consent and that this non-consensual testing caused plaintiff to commit armed robbery on December 20, 1957. Plaintiff now moves for sanctions based on various instances of misconduct allegedly committed by the United States and its counsel during pretrial proceedings. Specifically, plaintiff requests that the court exercise its inherent power to strike the United States' answer and enter summary judgment in his favor on the issue of liability. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

I. Facts

The court has set forth the factual and procedural background of this action in a number of previous orders. See Ritchie v. United States ("Ritchie I"), 210 F. Supp. 2d 1120 (2002) Order Denying Defendant's Motion to Dismiss); Ritchie v. United States ("Ritchie II"), No. C 00-3940 MHP, 2004 WL 1161171 (ND. Cal. May 24, 2004) (Order Denying Cross-Motions for Summary Judgment). As the court explained in those orders, the facts alleged in plaintiff's complaint are as follows: on December 20, 1957, plaintiff was unwittingly given food or drink laced with lysergic acid diethylamide ("LSD") or another psychoactive drug while he was attending a holiday party in the United States Post Office Building in San Francisco, California. Pl.'s Compl. ¶¶ 11-12. After drinking a substantial quantity of alcohol at the party and at several bars, plaintiff, fueled by drug-induced paranoia, resolved to hold up a bar and returned to his office where he took two revolvers from his personal locker. Id. ¶¶ 13-15. From there, plaintiff went to the Shady Grove Bar, where he had another drink and then drew a weapon and demanded money. Id. ¶ 15. Someone knocked Ritchie unconscious, and he was subsequently arrested. Id.

The United States now admits that during the 1950s, the CIA operated a federal program, known as " Project MKULTRA," that was dedicated to the research and development of LSD and other drugs that might be used to alter human behavior. The United States has also admitted that the program's activities in San Francisco ("CIA Subproject 42") were headed by George White, an agent of the Bureau of Narcotics who served as an MKULTRA subcontractor from approximately 1953 to 1964. McGinn Decl. ¶ 5. In that role, White established a safehouse apartment in San Francisco where psychoactive drugs were tested on drug informants and prostitutes. Id. Among the agents that White employed for this purpose was Ira Feldman, a supervisory group head at the Federal Bureau of Narcotics. See generally Dep. of Ira Feldman (Feb. 7, 2003) (hereinafter "Second Feldman Dep.") The crux of the parties' remaining dispute is whether Feldman or anyone else employed by Project MKULTRA administered

psychoactive drugs to plaintiff without his consent on December 20, 1957, and if so, whether those drugs induced a psychotic episode that led to plaintiffs attempted robbery of the Shady Grove Bar later that evening.

II. The Feldman Depositions

The misconduct that gives rise to plaintiffs sanctions motion centers around two depositions of Feldman taken by plaintiff's attorney. Plaintiffs counsel first deposed Feldman on July 30, 2002. At this first deposition, Feldman categorically denied any involvement in administering LSD to plaintiff or anyone else. See Dep. dim Feldman at 36, 244-45, 288 (Feb. 7, 2004) (hereinafter "First Feldman Dep."). However, after new evidence surfaced linking Feldman to Project MKULTRA, the court permitted plaintiff's counsel to depose Feldman a second time. During this second deposition, on February 7, 2003, Feldman recanted his earlier denial of his involvement in Project MKULTRA and admitted that he participated in the program under George White's supervision. Second Feldman Dep. at 346-47, 360-63, 428-35. Feldman further admitted that he had been involved in drugging non-consenting victims with LSD. Id.

The United States now concedes that Feldman was involved in Project MKULTRA. However, the parties disagree as to the evidentiary weight that should assigned to a number of inconsistencies in Feldman's testimony. Three of these inconsistencies are of particular relevance to plaintiff's motion for sanctions. First, after initially testifying that he never personally administered LSD to unwitting victims, several of Feldman's responses to questions posed at his second deposition appear to contradict his prior assertion. See, e.g., id. at 428 (appearing to admit the he personally administered drugs and did follow-up investigations on the behavior of the victims in approximately ten to twelve instances). Second, at his February 2003 deposition, Feldman initially continued to maintain that he neither knew plaintiff in December 1957 nor attended the Christmas party where plaintiffs drugging allegedly occurred. See id. at 354-55.

However, Feldman subsequently appeared to contradict this statement when he implicitly referenced plaintiff's psychotic episode at several points in his deposition. See id. at 360, 369, 428-29. Finally, and most significantly, Feldman at one point in the second deposition arguably admits to having personally administered LSD to plaintiff, directly contradicting a number of statements made at his first deposition. See Second Feldman Dep. at 428-29.

In Ritchie II, the court discussed these contradictions in Feldman's testimony at length. See 2004 WL 1161171, at *6-8. The court observed that "[t]he principal difficulty in evaluating plaintiffs motion for summary judgment on the issue of his LSD drugging here arises from the fact that the plaintiff and defendant rely most heavily upon the same witness [i.e., Feldman]." Id. at *6. Although the court went so far as to note that Feldman's testimony at his second deposition "appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge or consent," it also observed that "the statements that appear to implicate Feldman in Ritchie's alleged drugging do so only obliquely." Id. at *4, 6. Accordingly, the court concluded that "without a clear, categorical admission of involvement by Ira Feldman it is simply impossible for this court to conclude that no reasonable juror could find against plaintiff." Id. at *8. At the same time, the court held that Feldman's contradictory testimony raised triable issues of material fact related to the United States' liability. Id. The court therefore denied the parties' cross-motions for summary judgment as to whether plaintiff "was an unwitting victim of CIA Subproject 42." Id.

Plaintiff now alleges a number of instances of sanctionable misconduct arising from Feldman's testimony at his first and second depositions and the United States' reliance upon portions of that testimony in pleadings and moving papers submitted to this court. Plaintiff first asserts that Assistant United States Attorney ("AUSA") Patricia Kenney suborned perjury by preparing Feldman to testify falsely at this first deposition and by knowingly allowing his false testimony to remain uncorrected.

Next, plaintiff alleges that in the course of examining Feldman at his second deposition, Kenney continued to suborn perjury by asking him to clarify whether he personally gave anyone LSD at bars. See Second Feldman Dep. at 472.[1] In addition, plaintiff seeks sanctions based on Kenney's repeated attempts to interrupt Feldman's testimony at his second deposition, arguing that her interjections were made with the intent of preventing Feldman from testifying truthfully regarding his involvement in administering drugs to plaintiff. See id. at 435-38.[2] Finally, plaintiff identifies a number of instances where the United States relied on Feldman's testimony in pleadings and papers submitted to this court,. including: (1) the United States' proffer of Feldman's alleged perjured declaration on March 2, 2002; (2) the denial of Feldman's involvement in administering psychoactive drugs to non-consenting individuals set forth in the United States' answer and amended answer to plaintiffs complaint; (3) the United States' citation to false testimony given at Feldman's first deposition in its amended motion for summary judgment filed on September 16, 2002; and (4) citations to the same false testimony in the United States' November 7, 2003 opposition to plaintiff's motion for partial summary judgment. Plaintiff alleges that by knowingly relying on Feldman's perjured testimony, the United States committed fraud on the court in each of the above instances.

III. DEA's Failure to Comply with Plaintiff's Discovery Request

In addition to identifying the numerous instances of alleged misconduct related to Feldman's deposition testimony, plaintiff seeks sanctions based on the federal Drug Enforcement Agency's ("DEA's")[3] incomplete response to a discovery request that plaintiff propounded in September 2001. That request, as modified by the court's December 11, 2002 order to compel production of documents, required the DEA to name the witness most knowledgeable about documents relating to White and Feldman's involvement in Project MKULTRA and the DEA's investigation of that

program that took place in the late 1970s. Order to Compel at 2 (Dec. 11, 2003). The request also sought production of documents related to MKULTRA and the subsequent DEA investigation. Id. at 2-3. In response to the court's order, Feldman's "Official Personnel File" ("OPF") was produced in February 2003, approximately six months after the date of Feldman's first deposition and more than a year after plaintiff propounded his September 2001 discovery request. Plaintiff now argues that this delay was the product of bad faith on the part the DEA and its counsel, Ellen Harrison. Specifically, plaintiff contends that Harrison deliberately failed to contact him (presumably through counsel) and obtain his social security number with the intent of preventing the DEA's Office of Personnel Management ("OPM") from locating Feldman's personnel file.

IV. Plaintiffs Requested Relief

Based on the allegations of misconduct relating to Feldman's testimony and the DEA's failure to produce his personnel file, plaintiff urges the court to impose sanctions on the United States pursuant to the court's inherent power to prevent abuse of the judicial process. Plaintiff argues that United States' misconduct amounts to "fraud on the court" and the appropriate remedy for this fraud is entry of judgment against the United States on the issue of liability. The court considers the merits of plaintiffs argument below.

LEGAL STANDARD

Federal courts are vested with the inherent power to impose sanctions to punish abuse of the judicial process. Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991); Metro Publ' g, Ltd. v. San Jose Mercury News, No. C 91-20605 SW, 1995 WL 232363, at *3 (N.D. Cal. Apr. 17, 1995) (Williams, J.). Pursuant to this inherent power, a district court may enter default judgment against a party who fails to comply with pretrial discovery orders or interferes with the production of evidence. See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg.

Corp., 982 F.2d 363, 368 (9th Cir. 1992). However, the court's inherent power to impose sanctions for interference with the judicial process "must be exercised with restraint and discretion." Chambers, 501 U.S. at 45. The Ninth Circuit has therefore "routinely insisted upon a finding of bad faith before sanctions may be imposed under the court's inherent power." Zambrano v. City of Tustin, 885 F.2d 1473, 1478 (9th Cir. 1989). If a district court determines that bad faith or willful misconduct has occurred, other factors to be considered before entry of default judgment include the presence of "extraordinary circumstances," the efficacy of lesser sanctions, and "the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case." United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242, 247 (9th Cir. 1995) (quoting Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988)), on remand, No. CIV-92-1282 SVW, 2000 WL 33775399 (C.D. Cal. Jan. 20, 2000), aff'd, 243 F.3d 1181 (9th Cir.), cert. denied, 534 U.S. 1040 (2001). In addition, the district court may consider the prejudice to the party victim of the misconduct and the government interests at stake. Id. (listing "optional considerations"). Ultimately, the imposition of such sanctions is left to the sound discretion of the court. See Anheuser-Busch, Inc. v. Natural Beverages Distribs., 69 F.3d 337, 348 (9th Cir.1995) (citing Halaco Eng'g, 843 F.2d at 379).

DISCUSSION

Because plaintiff moves for sanctions pursuant to the inherent power of the court to prevent abuse of the judicial process, the court must first address the threshold issue of whether the United States acted in bad faith. See Zambrano, 885 F.2d at 1478. The court first addresses the allegations of bad faith misconduct related to Feldman's deposition testimony before turning to the DEA's failure to comply promptly with plaintiff's September 2001 discovery request.

I. The Feldman Depositions

Plaintiff first argues that the United States deliberately procured Ira Feldman's false testimony and relied upon that testimony in its submissions to the court, thereby perpetrating a "fraud on the court." If proven, plaintiffs allegations are sufficient to establish bad faith for the purpose of imposing sanctions under the court's inherent power. See, e.g., Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985). Plaintiff bears the burden of proving these allegations by - clear and convincing evidence. Phoceene Sous-Marine, S. A. v. United States Phosmarine Inc., 682 F.2d 802, 806 n.13 (9th Cir. 1982) (citing England v. Doyle, 281 F.2d 304 (9th Cir. 1960)).

A. Feldman's Perjury

Each of plaintiffs various allegations of fraud on the court ultimately traces back to the contradictory and apparently perjured testimony of Ira Feldman. As noted above, Feldman's testimony at his first and second depositions was rife with contradictions concerning his involvement in Project MKULTRA. See generally supra, at 3. These mutually inconsistent statements provide ample evidence to support plaintiffs assertion that Feldman lied under oath. However, [p]erjury by a party or witness, by itself, is not normally fraud on the court." In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999) (citing Gleason v. Jandrucko, 860 F.2d 556, 559-60 (2d Cir. 1988)). Indeed, because the effect of perjured testimony is to impair the witness' credibility, the Ninth Circuit has reasoned that despite the harm that deliberately giving false testimony can inflict upon the integrity of the judicial process, perjury is under most circumstances "an evil that could and should be exposed at trial." Id. at 1120 (citing Gleason, 860 F.2d at 560).

Nonetheless, in In re Levander, the Ninth Circuit recognized an exception to this rule. The case arose out of a motion by two Chapter 11 debtors to amend a bankruptcy court's order requiring an unsuccessful claimant in the bankruptcy proceeding to pay the debtors' attorneys' fees. Levander, 180 F.3d at-1116. The debtors argued that the perjured testimony of an officer of the claimant corporation allowed the corporation to

conceal the existence of a partnership to which the corporation' assets had been conveyed. Id. at 1117-18. Accordingly, the Chapter 11 debtors sought to amend the order awarding attorneys' fees to designate the partnership as an additional judgment debtor. Id. at 1117-18. The bankruptcy court granted defendant's motion, concluding that the corporation's fraudulent conduct justified disturbing the finality of its previously entered judgment. Id. at 1118. The district court reversed, and the debtors appealed to the Ninth Circuit. Id. The Ninth Circuit held that the bankruptcy court had properly exercised its inherent power to prevent fraud on the court. Id. at 1120. While recognizing that the mere presentation of perjured testimony is not a basis for finding a fraud on the court, the court of appeals distinguished the case before it from this general rule on the ground that neither the court nor the debtors knew the partnership existed at the time that the hearing on attorneys' fees was held. Id. at 1119-20. Thus, unlike the more common situation where perjured testimony will be exposed at trial, there was no reason for any party to question the veracity of the witness' fraudulent representations. Id. at 1120. Thus, the court held that because the factfinding procedures of the bankruptcy court had been "defiled by the perjury," the corporation's fraud amounted to "fraud on the court." Id..

In short, Levander and the cases on which it relies stand for the proposition that perjured testimony amounts to fraud on the court where a witness' false statements "harm[] the integrity of the judicial process." Id. (quoting In re Intermagnetics Am., Inc., 926 F.2d 912, 917 (9th Cir. 1991)); see also Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003) (observing that fraud on the court requires both a "grave miscarriage of justice and a fraud that is aimed at the court") (citation omitted), cert. denied, ___ U.S. ___, 125 S. Ct. 90 (2004). In contrast, perjured testimony that "merely" prejudices an opposing party can generally be exposed at trial and thus is not ordinarily a basis for entering default judgment in favor of the prejudiced party. Levander, 180 F.3d at 1120; Gleason, 860 F.2d at 560.

Applying this rule to the instant motion, the court finds that plaintiff's requested sanctions are not necessary to maintain the integrity of its factfinding procedures or to prevent a miscarriage of justice. As Ritchie II makes clears, the court is well aware of the damage done to Feldman's credibility by his obvious lack of candor under oath. See 2004 WL 1161171, at *7 n.7. The court, sitting as the trier of fact in this FTCA action, will weigh his testimony accordingly. Furthermore, having been allowed the opportunity to depose Feldman a second time in order to make use of newly discovered information linking Feldman to Project MKULTRA, plaintiff's counsel will once again have the opportunity to put Feldman's credibility to the test in open court. Thus, the situation that so concerned the Levander court—that neither the court nor the opposing party had any reason to question the veracity of a witness' testimony that was subsequently proven false—is simply not present here. The court therefore concludes that the falsity of Feldman's testimony cannot by itself be a basis for entry of default judgment against the United States.

B. Subornation of Perjury

Despite the general rule against imposing sanctions against a party based on the presentation of perjured testimony, the main thrust of plaintiff's argument is admittedly distinguishable from the Levander case in that it focuses on counsel's collusion with Feldman for the purpose of presenting false testimony. In the Ninth Circuit, courts have inherent power to dismiss an action or enter default judgment "when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." Fjelstad, 762 F.2d at 1338 (quoting Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983)). However, "[d]ue process limits the imposition of the severe sanctions of dismissal or default to 'extreme circumstances' in which 'the deception relates to the matters in controversy' and prevents their imposition 'merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case.'" Id. (quoting Wyle, 709 F.2d at 589, 591).

Here, plaintiff asserts that AUSA Patricia Kenney conspired with Ira Feldman to procure his perjured deposition testimony and deliberately encouraged him to lie during his depositions. As noted above, plaintiff's examination of Feldman at his second deposition clearly revealed a number of instances where Feldman's candor under oath was (to put it mildly) questionable. However, while the contradictions in Feldman's testimony severely impair the credibility of his testimony, these contradictions have been disclosed to the court and can be further explored by plaintiffs counsel at trial. Accordingly, nothing in Feldman's false testimony—deliberately procured or otherwise—"threaten[s] to interfere with the rightful decision" of the instant case. Accord Fjelstad, 762 F.2d at 1338. Thus, entry of default judgment is not an appropriate remedy for any misconduct that may have been committed by the United States.

In any event, the fact that portions of Feldman's testimony were indeed false, while undisputed, is not by itself sufficient to justify imposing sanctions on the United States pursuant to the court's inherent power. Rather, plaintiff must prove not only that Kenney presented testimony that was in fact false, but also that she knew that Feldman was committing perjury before his depositions were taken. See id. Again, plaintiff bears the burden of proving these allegations by clear and convincing evidence. Phoceene Sous-Marine, 682 F.2d at 806 n.13. In attempting to meet this burden, plaintiff relies on several interviews documenting Feldman's involvement in Project MKULTRA, on an article that appeared in Spin magazine in March 1994, and on a passage of a book written by John Marks, The CIA and Mind Control: The Search for the Manchurian Candidate. See Feldman Decl., Exhs. 1, 2, 9, 11. As the United States points out, Kenney was under no obligation to assume these unsworn statements to be true before undertaking an investigation of plaintiff's claims. Plaintiff nonetheless contends that Kenney "must have" known that Feldman's testimony was false before he testified at his first and second depositions, Pl.' Mem P. & A. at 14, and that she compounded her failure to correct Feldman's false statements by

actively encouraging him to give additional false testimony. As to the former allegation, plaintiffs assertion that the government knew that Feldman personally administered drugs to plaintiff or any other non-consenting victim of Project MKULTRA is based on sheer speculation. The United States also cites evidence to support its denial of having prior knowledge of Feldman's involvement in MKULTRA, asserting that it based this conclusion on an October 1979 CIA report that found no known connection between Feldman and the CIA. Def.'s Opp'n at 12 & Exh. 2. Although the United States' conclusion was subsequently proven false by facts disclosed in discovery and may have been somewhat suspect even at the time that it was made, the various interviews and print sources referenced in plaintiffs motion are not by themselves sufficient to establish that the United States acted in bad faith. The court therefore finds that plaintiff has not met his burden of proof on this issue.

Plaintiff's assertion that counsel for the United States deliberately encouraged Feldman to lie rests on an equally tenuous foundation. Aside from the aforementioned (and again unsubstantiated) assertion that Kenney "must have" known that Feldman's testimony at his first deposition was false, plaintiff's only support for this theory comes from Kenney's redirect examination of Feldman at his second deposition. After Feldman appeared to admit to his personal involvement in drugging at least ten to twelve people in his responses to several questions from plaintiff's counsel, Kenney attempted to clarify this testimony, asking him whether he ever personally went to a bar and put LSD in someone else's drink. Second Feldman Dep. at 472, 477-78. Feldman answered that he did not. Id. Plaintiff portrays this as an attempt to suborn perjury, citing several examples of Feldman's testimony at his second deposition that appear to contradict this denial.[4] However, plaintiffs view suggests a certainty in Feldman's admissions that is not reflected in the record. Indeed, in responding to questions from plaintiff's counsel, Feldman exhibited an unfortunate tendency to vacillate between first-person singular, first-person plural, and even second-person

pronouns in discussing his involvement in the drugging of human subjects, leaving significant ambiguity regarding the extent of Feldman's personal involvement in administering psychoactive drugs to non-consenting individuals.[5] This tendency went uncorrected by plaintiffs counsel. Thus, in the absence of evidence that Kenney had colluded with Feldman to procure his false testimony on the subject, there was nothing improper about Kenny's attempt to clarify this ambiguity. The court therefore finds that plaintiff has failed to meet his burden of proving by clear and convincing evidence that Kenney suborned perjury at either of Feldman's depositions.

C. Misleading the Court

Plaintiff next asserts the United States has improperly relied on Feldman's perjured testimony in its pleadings and other filings with the court. A district court may in its discretion award sanctions for the filing of "false or frivolous pleadings" or other papers pursuant to Federal Rule of Civil Procedure 11 as well as pursuant to the court's inherent power to prevent abuse of the judicial process. Chambers, 501 U.S. at 50-51. Although courts should generally seek to avoid relying on their inherent powers to punish conduct that is addressed by specific procedural rules, see Fjestad, 762 F.2d at 1338, the Ninth Circuit has held that reliance on a court's inherent power is appropriate where "the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address." Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997) (quoting Chambers, 501 U.S. at 51). Here, while the alleged instances of filing false pleadings could be addressed under Rule 11, these allegations are closely related to the alleged misconduct arising out of the Feldman depositions, which falls outside the scope of the rule's specific prohibitions. Accordingly, the court, following plaintiff's lead, focuses on allegations of bad faith misconduct that would, if proven, permit the court to impose sanctions on the United States pursuant to its inherent power. See In re DeVille 361 F.3d 539, 548 (9th Cir. 2004) (comparing bad faith requirement for impose sanctions pursuant to a court's

inherent power with the "objectively unreasonable conduct" standard of Rule 11).

Plaintiff first identifies several averments that were included in the United States' answer and amended answer. Specifically, plaintiff points out that despite evidence to the contrary, both the answer and the amended answer deny Feldman's involvement in the "planning, design, and execution" of Project MKULTRA. Pl.'s Compl. ¶¶ 7, 9; Def.'s Answer ¶¶ 7, 9; Def.'s Am. Answer ¶¶ 7, 9. There is now no doubt that the averments contained in plaintiff's answer are in fact false. Both parties concede that Feldman participated in Project MKULTRA and that, at a minimum, Feldman aided and abetted in the testing of psychoactive drugs on non-consenting victims. However, plaintiff once again fails to submit any non-speculative evidence that the United States knew the averments in its answer and amended answer to be false at that time that the pleadings were filed—i.e., on March 2, 2001, and June 6, 2001, respectively. A statement that the United States "must have known" that Feldman participated in Project MKULTRA based solely on a combination of the aforementioned hearsay sources and plaintiff's unsubstantiated assertions hardly amounts to clear and convincing evidence of bad faith. Thus, the court must reject plaintiffs attempt to seek sanctions based on the averments set forth in the United States' pleadings.

Plaintiff makes a similar argument with respect to the amended motion for summary judgment that the United States filed on September 16, 2002. In that motion, the United States cited passages from Feldman's first deposition in which he testified that he (1) did not attend the Christmas party at the Post Office Building in December 1957; (2) had never slipped LSD into anyone's drink or had conversations with George White about doing so; and (3) had no knowledge that White was testing drugs on human beings. Def.'s Am. Mot. S.J. at 2-3 (Sept. 16, 2002). Plaintiff argues that the United States deliberately misled the court by including these factual contentions in its motion with knowledge of their falsity. As for the first two contentions, the

evidence presented in this court has yet to prove either statement to be unequivocally false. The court refuses to presume that the United States had knowledge of their falsity in September 2002 when the court itself has not resolved disputes of material fact regarding these issues more than two years later. As to the third statement, it is true that Feldman's testimony at his second deposition convincingly established that he participated in Project MKULTRA under White's supervision. However, the United States made this allegedly fraudulent representation approximately six months before this second deposition was taken. In the absence of any evidence in the record suggesting that the United States actually knew the statement to be false in September of 2002, the court again refuses to engage in speculation regarding what the United States "must have known" at that time.

The factual premise of plaintiff's next allegation, the United States' proffer of Feldman's declaration on July 30, 2001, is even more tenuous. The declaration carefully avoids any mention of Feldman's participation in Project MKULTRA (or lack thereof) and instead focuses narrowly on Feldman's assertions that he did not attend the Christmas party at the Post Office Building and that he "d[id] not recall knowing anyone by the name of Wayne A. Ritchie." Benson Decl., Exh. 8 ¶14 (Declaration of Ira C. Feldman). As the court observed in Ritchie II, Feldman's testimony at his second deposition certainly casts doubt on the credibility of this denial. 2004 WL 1161171, at *6. However, in light of the "oblique[]" nature of the statements inculpating Feldman in Ritchie's drugging, the court concluded that it remained unclear whether reference to plaintiff's robbery triggered an unconscious admission or merely induced Feldman to offer a needless and unfortunate comparison." Id. Thus, the court concluded that "it is inescapable that other explanations beyond Feldman's guilt explain his remarks." Id. In adjudicating this motion, the court cannot, hold counsel for the United States to a higher standard than it sets for itself in determining whether a material fact remains in dispute for the purpose of summary judgment. Indeed, it is understandable the

United States chose to resolve these factual disputes in its favor in July 2001 Accordingly, the court finds no basis for awarding sanctions based on the statements contained in Feldmans declaration.

Finally, plaintiff accuses the United States of knowingly citing Feldman false testimony in its opposition to plaintiff's motion for summary judgment filed on November 7, 2003, arguing that the government's opposition improperly relied on testimony given at Feldman's first deposition. The specific statements cited by plaintiff involves Feldman's testimony regarding (1) whether he read a newspaper article about plaintiff's attempted robbery that appeared in the San Jose Mercury News two days of after the alleged doping incident and (2) whether Feldman knew plaintiff at the time of the robbery. See Def.'s Opp'n Mot. S.J. at 4, 8-9 (Nov. 7, 2003). In support of these allegations, plaintiff relies on a single statement in Feldman's second deposition where he appears to concede that he read the aforementioned newspaper article at the time of its publication. Second Feldman Dep. at 360 ("We didn't know about [Feldman's robbery] for months, until the San Jose paper came out."). Of course, there are numerous other passages in Feldman's testimony that directly contradict this statement. See e.g., First Feldman Dep. at 245-46; Second Feldman Dep. at 354-55.[6] The United States' opposition does little more than call these contradictions to the court's attention. Such conduct can hardly be considered improper where a party seeks to establish a disputed issue of material fact for the purposes of opposing a motion for summary judgment. The court recognized as much in Ritchie II, concluding that "[d]espite the vagaries of Feldman's responses," Feldman's involvement in Ritchie's drugging remained "an issue about which reasonable jurors might well disagree." 2004 WL 1161171, at *8. The court's conclusion applies with equal force to the beliefs of counsel for the United States. Thus, the court declines to award sanctions on this bases.

D. Interference with Taking of Feldman's of Second Deposition

In his final allegation of misconduct arising out of

Feldman's deposition testimony, plaintiff asserts that AUSA Patricia Kenney intentionally obstructed the examination conducted by his counsel during Feldman's February 2003 deposition. Plaintiff again seeks sanctions pursuant to the court's inherent power to prevent abuse of the judicial process. Although the Federal Rules of Civil Procedure authorize sanctions for certain discovery-related misconduct, it is well-settled that courts retain inherent power "to impose sanctions for discovery abuses that may not be a technical violation of the discovery rules." Halaco, 843 F.2d at 380; see also Anheuser-Busch, 69 F.3d at 348 (collecting cases). However, regardless of the source of the court's authority, the severe sanction of entry of default judgment against the offending party is justified only in "extreme circumstances" and should be imposed only when necessary "to insure the orderly administration of justice and the integrity of the court's orders." Halaco, 843 F.2d at 380 (citing Wyle, 709 F.2d at 589; United States v. National Med. Enters., Inc., 792 F.2d 906, 910 (9th Cir.1986)); see also Fjelstad, 762 F.2d at 1338.

Plaintiff urges the court to sanction the United States for Kenney's repeated attempts to interrupt the examination of Feldman by plaintiffs counsel during his second deposition. This court has already concluded that the "obdurate behavior" of Patricia Kenney "may well have denied plaintiff the opportunity to solicit further valuable testimony." Ritchie II, 2004 WI, 1161171, at *7 n.6. Nonetheless, the court finds that plaintiff's sought-after remedy—entry of judgment against the United States as to liability—is grossly out of proportion to the harm that Kenney's behavior inflicted on the integrity of the judicial process. Indeed, at trial, plaintiffs counsel will have the opportunity to ask the follow-up questions that Feldman managed to evade as a consequence of Kenney's misconduct. Moreover, even if the court were to strike the portions of the United States' answer denying that Feldman administered drugs to plaintiff, plaintiff would still bear the burden of proving causation. Although Kenney's conduct was certainly unprofessional, the court refuses to permit plaintiff to use her behavior as an excuse to

avoid its obligation to prove its *prima facie* claim for relief by presenting evidence at trial. The court therefore concludes that despite Kenney's obstreperous conduct, it would be an abuse of discretion to enter default judgment against the United States on the issue of liability.

However, the court has discretion to fashion a remedy that is more closely proportionate to the gravity of Kenney's misconduct. In particular, Federal Rule of Civil Procedure 30(d)(3) provides that the court may impose an "appropriate sanction" on any person responsible for "any impediment, delay, or other conduct [that] has frustrated the fair examination of the deponent." Fed. R. Civ. P. 30(d)(3). Such sanctions may include "costs and attorneys' fees incurred by any of the parties as a result [of the obstructionist conduct]." Id.; see also Castillo v. St. Paul Fire & Mar. Ins. Co., 938 F.2d 776, 779 (7th Cir. 1991) (upholding award of attorneys' fees to opposing party based on counsel's "repetitious obstructive tactics" at deposition). Here, Kenney repeatedly interrupted the examination of Feldman by plaintiff's counsel without the benefit of an objection. Whether this in fact prevented plaintiff's counsel from soliciting testimony that would directly inculpate Feldman in plaintiff's drugging is a question that remains unanswered. Nonetheless, Kenney denied plaintiff's counsel the opportunity to attempt to solicit such testimony. The court finds this conduct to be sanctionable under Rule 30(d)(3).

As noted above, sanctions under Rule 30(d)(3) generally take the form of attorneys.' fees and costs incurred as a result of the sanctionable conduct. See, e.g., Castillo, 938 F.2d at 779. Admittedly, the costs that plaintiff incurred as a result of Kenney's misconduct in the instant action are highly uncertain. It is possible that Feldman could have made an admission of guilt that was sufficiently convincing so as to justify entry of summary judgment on that issue. On the other hand, pressing on with the examination may have revealed nothing further about Feldman's involvement in plaintiffs drugging. Certainly Kenney's obstructionist tactics interfered with the flow of the deposition

and the ability to obtain clear coherent answers. Much of those tactics also afforded the opportunity to signal or slant the answers, thus distorting the statements of the deponent. Courts have an obligation to protect the discovery process to ensure it does not mislead the opposing party or the court and that it does not obfuscate the truth. In light of the uncertainty occasioned by Kenney's tactics, the court finds that an award of reasonable costs and attorneys' fees that plaintiff incurred in taking Feldman's second deposition best reflects the gravity of Kenney's misconduct and the extent to which plaintiff was prejudiced by it. The court therefore orders Kenney and the United States to each pay one-half of this amount to plaintiff.

II. Failure to Obtain Feldman's Social Security Number

Plaintiff's remaining allegations of misconduct relate to the DEA's incomplete response to plaintiff's September 2001 request for production of documents. Specifically, plaintiff contends that the DEA and its attorney, Ellen Harrison, failed to produce Feldman's personnel file in a timely fashion, and moreover, that they did so with the intent of concealing the "embarrassing" contents of the file. Under Federal Rule of Civil Procedure 37(b)(2), a district court may impose a range of sanctions against a party who "fails to obey an order to provide or permit discovery," including an order "rendering a judgment by default against the disobedient party." Fed. R Civ. P. 37(b)(2)(C). The court also retains the inherent power to sanction litigants who abuse the discovery process. Regardless of the source of the court's authority, the Ninth Circuit applies the aforementioned "extreme circumstances" test in determining whether entry of default judgment in an appropriate sanction for discovery-related misconduct. United States ex rel. Wiltec Guam v. Kahaluu Constr. Co., 857 F.2d 600, 603 n.5 (9th Cir. 1988) (using "use both types of cases interchangeably" for purpose of reviewing order granting default judgment). However, unlike sanctions under the court's inherent power, Rule 37 sanctions are not available in the absence of a court order compelling discovery. Fed. R. Civ. P. 37(b); see id. at 602-03.

Because the bulk of the DEA's allegedly sanctionable misconduct occurred before the court issued an order compelling production of Feldman's personnel records on December 11, 2002, the court's power to sanction the DEA rests primarily on its inherent authority to prevent abuse of the judicial process. See Wiltec Guam, 857 F.2d at 602-03. Thus, the issue is once again whether the United States—in this instance represented by the DEA and its attorney, Ellen Harrison—deliberately obstructed plaintiff's attempts to conduct discovery. Specifically, plaintiff seeks to prove that Harrison remained willfully ignorant of Feldman's social security number, thereby preventing the DEA from locating his personnel file and disclosing documents related to an internal Bureau of Narcotics investigation in which he was found to have lied under oath. However, based on Harrrison's uncontroverted testimony, the DEA's Office of Personnel Management neither required nor routinely requested a former employee's social security number before processing a request for a personnel file. Dep. of Ellen Harrison at 105-07 (Apr. 4, 2003) (hereinafter "Harrison Dep."). Harrison further testified that she initially followed the DEA's "routine" procedure for requesting Feldman's file. Id. Plaintiff correctly observes that this routine procedure resulted in unnecessary delays in obtaining documents in the DEA's possession, and this court recognized as much in granting plaintiff's motion to compel their production. However, there is no need to resort to allegations of subterfuge to explain the inability of an arm of the federal bureaucracy to respond to plaintiffs request in a timely manner. Inefficiency and incompetence are at least as likely to be the root cause of the delays experienced by plaintiff. While unfortunate, such delays are hardly evidence of Harrison's bad faith.

Furthermore, there is no serious dispute that Harrison responded to the court's December 2002 order to compel with reasonable diligence. Upon issuance of the order, Harrison undertook an inquiry that she characterized as "above and beyond [DEA's] standard procedures' in order to obtain Feldman's OPF. Harrison Dep. at 110. As a result of Harrison's efforts, plaintiff's

counsel received Feldman's personnel file prior to February 7, 2003, enabling him to review its contents in preparation for Feldman's second deposition, thereby any serious prejudice to plaintiff. Thus, while it may be true that the DEA acted unreasonably in taking almost eighteen months to respond to plaintiff's September 2001 discovery request, such unreasonable conduct cannot by itself cannot justify the severe sanctions that plaintiff now seeks to impose on the United States. Accordingly, the court must deny plaintiffs request for sanctions on this ground.

CONCLUSION

For the reasons stated above, plaintiff's motion for sanctions against the United States pursuant to the inherent power of the court is DENIED.[7] The court ORDERS that sanctions be imposed against the United States and Patricia Kenney pursuant to Federal Rule of Civil Procedure 30(03). The United States and Kenney are ORDERED to each pay one-half of the amount of reasonable costs and attorneys' fees incurred by plaintiff in taking Ira Feldman's deposition on February 7, 2003. The parties shall meet and confer by March 2, 2005 in order to attempt to resolve any disputes regarding the amount of reasonable costs and attorneys' fees to which plaintiff is entitled. The parties shall submit a joint statement setting forth any unresolved disputes as to the amount of costs and attorneys' fees no later than March 9, 2005.

IT IS SO ORDERED.

DATED: January 5, 2005

/s/

Marilyn Hall Patel District Judge

ENDNOTES

1. Specifically, when asked whether he ever took a vial of LSD to a bar and put it someone else's drink, Feldman answered: "No, I never did it myself. I always gave it to other people." Second Feldman Dep. at 472. Kenney later asked Feldman if he was referring to himself as having tested drugs in bars when he testified that "we tested those drugs in bars," to which Feldman responded: "Not personally involved, no." Id. at 477-78.

2. The most notable interruption occurred at the following point in Feldman's second deposition, where he appeared to be implicating himself in plaintiffs drugging:

A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone. And then he waits -

MS. KENNEY [defendant's counsel]: Mr. Feldman

MR. BENDER [plaintiffs counsel]: He is answering the question. I object to your doing that at a critical time like this. You have some nerve to interrupt that witness now. That's horrible.

MS. KENNEY: He appears to be spacing out.

MR. BENDER: He is not spacing out. You may be spacing out because of the testimony he is giving.

MS. KENNEY: The video will show it.

MR. BENDER: It sure will.

MS. KENNEY: Go ahead.

MR. BENDER: Will you pick up where he left off? Will you read it to him?

MS. KENNEY: We have been sitting here since -

MR. BENDER: We are in the middle of an answer

MS. KENNEY: We have been sitting here since 1 o'clock this

afternoon. At a convenient time we will take a break.

MR. BENDER: We had a break.

MS. KENNEY: You tell me when it is convenient. But sometime between now and 4:00.

MR. BENDER: Who do you think you are, to interrupt this witness like that at a critical time? You know what you are doing.

MS. KENNEY: Excuse me. I don't agree with you that it is at a critical time.

MR. BENDER: You know. That is why you did it.

MS. KENNEY: I don't agree with you.

MR. BENDER: Of course you don't.

MS. KENNEY: Do you want the reporter to read it back?

MR. BENDER: Please give him his answer as he is giving it. (Record read).

Q. Do you want to continue?

A. No. That's it. That's all I remember.

Q. Can you give us some instances, when you were working with White, about who should be drugged?

A. No. I couldn't give you any instances at all.

MR. BENDER: Okay. Let's take a break.

Second Feldman Dep. at 435-38.

3. The DEA assumed the responsibilities of the former Bureau of Narcotics upon its creation in 1973. Drug Enforcement Administration: The History of the DEA from 1973 to 1998 (1998), available at http://www.dea.gov/pubs/history/deahistory_01.htm#1 (last visited Dec. 10, 2004).

4. On the other hand, Kenney's questions specifically asked

plaintiff (sic) whether he had ever personally administered LSD to a person in a *bar*. See note 1, supra. Because plaintiff alleges that he was drugged at the Post Office Building rather than in a bar, it is possible that a finder of fact could conclude that Feldman's answers to Kenney's questions were truthful but nonetheless find that Feldman drugged plaintiff in the manner that has been alleged in the complaint.

5. See, e.g., Second Feldman Dep. at 361 (noting that "we knew" the identity of persons to whom LSD was being administered); id. at 428 (" I drugged guys involved in about ten, twelve, period."); id. at 361 (answering, in response to a question about how he administered LSD, that "you would either cut off the top or you would bite . . . off the top of a small ampule).

6. The fact that Feldman incorrectly testifies that the article in the "San Jose paper" came out "months" after plaintiffs arrest also suggests that his recollection of an event that occurred almost 50 years ago was understandably incomplete at the time that his deposition was taken:

7. Because the court denies plaintiffs motion for sanctions on other grounds, it need not address the United States' argument that Federal Rule of Civil Procedure 55(e) limits the court's inherent power to enter default judgment against the federal government under the present circumstances. In addition, the United States' motion to strike plaintiffs proposed order with proposed findings of facts and conclusions of law is DENIED as moot.

United States District Court,
N.D. California.
Wayne A. **RITCHIE**, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.
No. C 00-03940 MHP.

May 24, 2004.

Robert E. Cartwright, Kent L. Klaudt, Cartwright & Alexander LLP, San Francsico, CA, Sidney Bender, Risa Bender, Leventritt, Lewittes & Bender, New York, NY, for Plaintiff.

Robert S. Mueller, III, Susan L. Kamlet, Patricia J. Kenney, U. S. Attorney's Office, San Francisco, CA, Jocelyn Burton, U.S. Attorney's Office, Oakland, CA, for Defendants.

MEMORANDUM & ORDER
Plaintiff's Motion for Summary Judgment

PATEL, Chief J.

Plaintiff Wayne Ritchie has alleged in this action that the Central Intelligence Agency and the Bureau of Narcotics tested psychoactive drugs on unknowing and unwitting American citizens including plaintiff during the 1950s, and that this non-consensual testing drove plaintiff to commit an armed robbery on December 20, 1957. Plaintiff initially filed claims against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq* . ("FTCA"), and against Robert V. Lashbrook and Ira Feldman under the First, Fourth, Fifth and Eighth Amendments to the United States Constitution. Plaintiff sought twelve-million dollars in compensatory damages, as well as costs and attorneys' fees.

The court previously dismissed plaintiff's constitutional claims, but has allowed plaintiff to proceed under the FTCA.

Now before the court are plaintiff and defendant's cross-motions for summary judgment. Defendant has filed for complete summary judgment on the issue of causation, arguing that plaintiff cannot prove that he was administered lysergic acid diethylamide (LSD) by the United States government in 1957, and that even assuming that he had been dosed with LSD, he cannot prove that the LSD caused him to commit the armed robbery that gave rise to this action. Plaintiff has moved for summary judgment on the particular issue of whether "Wayne Ritchie was an unwitting LSD victim of CIA Subproject 42."[1] Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

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[1] Neither defendant nor plaintiff has been entirely clear regarding the issues they have asked the court to decide on summary judgment. As noted above, plaintiff has requested summary judgment simply on the question of whether Ritchie was "an unwitting victim of CIA Subproject 42," while defendant has requested summary judgment on the issue of "causation." Defendant appears to contest what might be considered both parts of the causation question--whether Ritchie can show that he was actually administered LSD, and whether he can demonstrate further that this LSD caused him to attempt an armed robbery. Plaintiff's summary judgment motion is somewhat less clear, but it appears to focus primarily upon the question of whether he was ever actually dosed with the drug, not whether his subsequent behavior is attributable to that dosing. (Plaintiff's opposition brief seems to incorporate this second question in addition, but that fact is irrelevant. Plaintiff cannot introduce new issues to be decided in his responsive pleadings.) As a result, this court will assume that defendant has filed a motion for summary judgment on both causation questions, and that plaintiff has filed a motion for summary judgment only with regard to whether the CIA administered him LSD.

As explained in this court's July 1, 2002, Memorandum and Order, plaintiff, a former Deputy United States Marshal, alleges that he was unwittingly given food or drinks that were laced with lysergic acid diethylamide (LSD) or another psychoactive drug while he was attending a holiday party in the United States Post Office Building on December 20, 1957. Compl. ¶12. According to plaintiff's uncontradicted declaration, Ritchie first arrived at his office's Christmas party at approximately noon on December 20, 1957. Ritchie Dec. ¶ 5. He drank a single bourbon and soda and returned to his office shortly thereafter. *Id.* Two hours later, Ritchie re-entered the party and consumed three or four more drinks. *Id.* at 6. Plaintiff then began to feel paranoid and imagined that his fellow officers and co-workers had turned against him. *Id.* at 7. He left work, returned home briefly, and then visited four bars, where he consumed a total of two more drinks. *Id.* at 7-9. Still fueled by paranoia, plaintiff then resolved to hold up a bar and returned to his office where he took two revolvers from his personal locker. *Id.* at 9-10. He entered a fifth bar, had one drink, and then drew a weapon and demanded money. *Id.* at 10. Someone knocked Ritchie unconscious, and he was subsequently arrested. *Id.* at 10-11.

Plaintiff alleges that he was a victim of a federal program, called "MKULTRA," dedicated to the research and development of drugs, including LSD, that might be used to alter human behavior. Compl. ¶ ¶ 18 & 26. Plaintiff maintains that he "first suspected that he might have been surreptitiously drugged" when he read the obituary of Dr. Stanley Gottlieb, a former CIA agent implicated in that agency's mind-control program, in the newspaper on March 15, 1999. Compl. ¶ 23. He found additional support for his suspicion in April 1999 when he read a diary entry of George White, an agent of the Bureau of Narcotics and allegedly the operating head of the CIA's "mind-altering program" in San Francisco. *See* Compl. ¶ 24; Ritchie Dep., Exh. B-12 (White was a senior employee at the San Francisco Federal Narcotics Bureau in the 1950s).

White's December 20, 1957, diary entry stated, in part, "xmas party Fed bldg Press Room." Ritchie Dep., Exh. D; Compl. ¶ 25.[2] [FN2] White was an MKULTRA subcontractor from approximately 1953 until 1964. McGinn Dec. ¶ 5. In that role, he established a safehouse apartment in San Francisco where drug tests were conducted on drug informants and prostitutes. *Id.* Defendant has also produced an extensive record of newspaper and television coverage documenting federal mind-control experimentation. *Id.*, Exhs. A-C (newspaper articles) & X (books).

Today, neither party disputes that MKULTRA existed, and that Ira Feldman and George White were engaged in the involuntary drugging of unwitting suspects in San Francisco on behalf of the CIA. *See generally* 2nd Feldman Dec. Both sides agree further that plaintiff suffered a brief psychotic episode on the night of December 20, 1957, that resulted in his attempted robbery of the Shady Grove Bar. *See, e.g.*, Gottlieb Rep., at 17 ("Brief Psychotic Disorder on December 20 1957"); Ketchum Rep., at 10 ("It is certainly appropriate ... to regard Wayne's episode as a temporary psychotic disorder."). These cross-motions for summary judgment concern the particular questions of whether Wayne Ritchie was himself a victim of the CIA's MKULTRA program, and whether Ritchie can establish that this alleged drugging with LSD was the cause of his psychotic episode.

LEGAL STANDARD

Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Material facts are those which may affect the outcome of the case.

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[2] The full entry reads: "home flu--xmas party Fed bldg Press Room." Ritchie Dep., Exh. D.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The moving party for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. *Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir.1994). The court may not make credibility determinations, *Anderson*, 477 U.S. at 249, and inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

DISCUSSION

I. *Admission of the Levy and Loftus Declarations*

At a case management conference held on November 5, 2003, defendant's counsel announced that she had filed Rule 26 reports for two additional expert witnesses, Dr. Mark I. Levy, M.D., and Dr. Elizabeth F. Loftus, Ph.D., within the past two days, and that she intended to rely upon the testimony of these two experts in her motion for summary judgment. Defendant had already long since filed Rule 26 reports for two other expert witnesses, and plaintiff had been

afforded the opportunity to depose these witnesses. In light of the fact that this case is approximately three years old, and the fact that cross-motions for summary judgment have long been anticipated, the court noted that it did not look favorably upon the eleventh-hour introduction of defendant's third and fourth experts.[3] Nonetheless, the court stated that it would allow defendant to submit a declaration describing the necessity of having the court consider the declarations of Dr. Levy and Dr. Loftus, and might allow said testimony into the record were such necessity well established.

Defendant's counsel has failed to provide any reasonable argument that Dr. Levy and Dr. Loftus are essential to the proper resolution of these motions for summary judgment. In its proffer of their testimony, defendant merely restates its spurious claim that no deadlines existed in this case for the filing of expert reports and that defendant only became aware of the existence of these experts in September 2003. These assertions elide the fundamental points of timeliness at issue here, namely that this case is already several years old, and that plaintiff had already filed a motion for summary judgment *before* defendant filed reports of its third and fourth experts. Reasonable diligence on the part of defendant's counsel would have brought these experts to the fore much earlier--the issues about which these individuals opine are not new, only the experts themselves are. Before this court could consider these two new experts in the context of this motion for summary judgment, it would be necessary to allow plaintiffs to depose them both and submit an updated declaration from plaintiff's own expert in response. These

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[3] In support of his motion for summary judgment and in opposition to defendant's, plaintiff has proffered one expert witness, Dr. James S. Ketchum, M.D. Dr. Ketchum's expert declaration was filed in 2002, and defendant subsequently deposed Dr. Ketchum.

steps would likely occasion an additional delay in these proceedings of several months, if not more. Defendant has failed to offer any particularized explanation regarding the importance of the opinions offered by Dr. Levy and Dr. Loftus, or any reason that this court should agree to further postpone consideration of the parties' long-awaited motions for summary judgment on their or defendant's behalf. By consequence, the court declines to consider the declarations of Dr. Levy and Dr. Loftus in conjunction with these motions.[4]

II. *Ritchie as Unwilling LSD Victim*

A. *Plaintiff's Principal Proffered Facts*

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[4] Defendant asserts with some vehemence that neither expert's testimony would be redundant or cumulative in view of the two experts already proffered by defendant. While this asseveration indeed appears to be correct, Dr. Levy's testimony is instead, quite ironically, contradictory to that of Dr. Abraham and Dr. Gottlieb. Dr. Abraham and Dr. Gottlieb both concluded, on the basis of available evidence, that Ritchie's psychotic episode was more likely caused by alcohol than by ingestion of LSD. Dr. Levy, on the other hand, opines that "there is no known scientific method by which, retrospectively, 47 years after the fact, an accurate determination can be made as to whether the brief psychotic episode allegedly experienced by Mr. Ritchie on December 20, 1947, [sic] was caused by Mr. Ritchie's admitted contemporaneous heavy use of alcohol as opposed to his having been surreptitiously drugged with LSD or some other hallucinogenic agent." Levy Decl. ¶ 2. While this approach does add another potential basis according to which this court could find in favor of defendant, it simultaneously serves to undermine the arguments which defendants other experts had advanced with such certainty.

1. *Direct Evidence*

In support of his motion for summary judgment on the issue of whether he was administered LSD unwittingly pursuant to CIA Subproject 42, Ritchie relies upon the confluence of several different pieces of evidence. The most important evidence, and the only direct indication that he may have been drugged, is the deposition testimony of Ira Feldman, a supervisory group head at the Federal Bureau of Narcotics (FBN), who worked under George White and Dr. Sidney Gottlieb (another CIA employee) on the MKULTRA project. Plaintiff first deposed Feldman on July 30, 2002; when further evidence linking Feldman to Project MKULTRA subsequently came to light this court permitted plaintiff to depose Feldman a second time. During this second deposition, taken on February 7, 2003, Feldman appears to admit that he administered LSD to Wayne Ritchie without Ritchie's knowledge or consent. Feldman gives this indication three times, though each reference is somewhat oblique. First, he states: "I drugged guys involved in about ten, twelve, period. [sic] I didn't do any follow-up, period, because it wasn't a very good thing to go and say 'How do you feel today?' You don't give them a tip. *You just back away and let them worry like this nitwit, Ritchie."* 2nd Feldman Dep., at 428 (emphasis added). Following that statement, Feldman engaged in a colloquy with plaintiff's counsel in which he appeared to inculpate himself in Ritchie's drugging a second time:

> Q. When you say 'let them worry,' you mean let them have a full head of LSD and let--
>
> A. Let them have a full head, like what happened, like what happened *with this nut when he got out and got drunk.*
>
> *Id.* at 428-29 (emphasis added).

Later, Feldman was asked if he were essentially "deciding who was going to suffer," and implicitly referenced Ritchie a

third time, replying that

> I didn't say anybody had suffered. I didn't say anybody suffered. *The bird, like this guy, who saw snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone.*

Id. at 435 (emphasis added). Feldman further explained that the LSD testing was undertaken in order to explore that drug's potential use "[b]oth in interrogation and in provoking erratic behavior." *Id.* at 369-70.

2. *Circumstantial Evidence*

Plaintiff also points to George White's diary entry from December 20, 1957, as further evidence that he had been unwittingly dosed with LSD. Feldman testified at his deposition that he would inform George White of his activities for MKULTRA, and that White exercised some degree of operational control over Feldman's activities. Explained Feldman, "When it [the LSD drugging] was done, and I got a report, I wrote it up and gave it to White, and I have no idea what White did with that report." *Id.* at 432. White's diary for December 20, 1957, notes that he was home with the flu but references a Christmas party in the Federal Building press room (White was stationed in San Francisco); Feldman identified White's writing in this diary entry.[5] Bender Dec.

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[5] Defendant notes that the December 20, 1957, Christmas party is one to which presumably all federal law enforcement employees in San Francisco were invited, and thus the entry in George White's diary may indicate that he was referencing the gathering as little more than a social event. In fact, White's diary contains a similar entry on December 21, 1956; on that date, it reads "Christmas party press room." 2nd Feldman Dep., at 408.

October 17, 2003, Exh. H, at 1; 2nd Feldman Dep., at 411. Feldman confirmed that White's illness would not have impeded his work; a planned LSD test would have taken place irrespective of whether or not White was sick and had to remain at home:

> Q. If George White was home with the flu, would you continue to carry out your operations in terms of the job, as you knew it?
> A. Of course. I was only an agent. I wasn't the boss.
> Q. But you had certain assignments, and you would carry them out?
> A. Absolutely.

Id. at 413. For his part, Ritchie avers that he attended that Christmas party, which took place in the San Francisco Post Office Building where he worked. Ritchie Dec. ¶ 4. Feldman indicated that the "Post Office Building" in which Ritchie worked and the "Federal Building" described in White's diary were one and the same. 2nd Feldman Dep., at 408-411. Both sides also agree generally that the CIA (and Ira Feldman in particular) was engaged in drugging unwitting victims with LSD in and around 1957. *See generally* 2nd Feldman Dep.

In addition, plaintiff points to the very fact of his behavior as evidence that he was under the influence of LSD. The parties' agreement that Ritchie experienced a psychotic episode is tantamount to agreement that his actions on the night of December 20, 1957, were completely out of character. Plaintiff alleges that his expert's diagnosis that he must have ingested LSD, coupled with Ira Feldman's apparent admissions, paint a compelling picture and constitute the necessary level of proof for a summary judgment motion on this issue. Plaintiff supplements this argument with the testimony of Dan Casey, a San Francisco-based federal narcotics agent who knew Ritchie and found his actions on the night of December 20, 1957, completely out of character. *See*

Casey Dep., at 7-10. Since these medical diagnoses are relevant to the separate causal issue of Ritchie's attempt to isolate the particular catalyst for his psychotic episode, they are discussed at greater length below. The court addresses the dueling opinions of plaintiff and defendant's experts at length in Section III., *infra,* and discusses the importance of these diagnoses' to plaintiff's claim of having been drugged by the CIA at the December 20th Christmas party below in Section II.C.

B. *Defendant's Principal Proffered Facts*

The evidence that defendant offers in contradiction of Ritchie's claim centers around the *first* deposition of Ira Feldman, taken on July 30, 2002. In the course of that deposition, Feldman repeatedly stated that he had never heard of plaintiff, would not recognize him if shown a photo of him, and had not administered LSD to him. *See* 1st Feldman Dep., at 245-46 ("Q: Now, did you remember a Deputy U.S. Marshal by the name of Wayne Ritchie? A: Never, never, never. I never--if he walked in here now, I wouldn't know him."). Feldman testified further that he did not even attend the Christmas party in the Post Office Building on December 20, 1957, at which plaintiff alleges he was dosed with LSD. *Id.* at 168-69 ("Q: Did you ever attend a holiday party over at the Post Office building? A: No, I didn't."). Placing the final categorical stamp on his denials of involvement in the substance of plaintiff's allegations, Feldman states that he never even entered the press room of the Post Office Building where plaintiff claims he was drugged. *Id.* at 237 ("Q: And what usually occurred in the press room? Was that for press conferences? A: I don't know. I was never there. I never was there. Q: You were never in that room? A: Never in that room.").

Defendant also points to an exchange that occurred towards the beginning of Feldman's *second* deposition in

which Feldman again denies any knowledge of or involvement with the alleged doping of plaintiff with LSD. The exchange between plaintiff's counsel and Feldman is somewhat meandering, and each individual question and answer could appear ambiguous if not read in context, and so the conversation is reproduced at length below:

> Q: And could you give us, to the best of your recollection, some examples of the things that you now recall that happened to people ... by giving LSD?
>
> ...
>
> A: People would become very hallucinogenic. They would see things that they shouldn't see. They had trouble walking. They had trouble eating. A lot of people threw up, and a lot of people passed out.
>
> ...
>
> Q: No. But I'm talking about your experience when you said "it made people act like jackasses."
>
> A: Yes. When they fell down, when they spit all over themselves, yes, they are jackasses. Normal people don't act that way.
>
> ...
>
> Q: If somebody acted like a jackass, would that be erratic behavior?
>
> A: It depends on what Webster says. I don't know what it is.
>
> Q: And how about if somebody went out and held up a bar? This would be erratic behavior, wouldn't it?
>
> A: No. That would just be a drunken bum.
>
> Q: Or would it be a jackass?
>
> A: No. It wouldn't be a jackass. He would be a U.S. Marshal that got drunk and fell on his ass. That's what he would do.

Q: I see.

A: He doesn't come under this cover here.

Q: I see. You remember that situation?

A: *No. I don't remember that situation.* But this last two or three years it has all been your clients that got drunk. I don't remember the situation. *I wasn't even there, period. Nobody I knew was there.* He just got loaded and he fell on his ass and he pulled out a gun and he held up a bar. If you can beat that in court, be my guest.

Q: And you know, as a fact, sir, from your position and expertise in administering LSD, that he did not have LSD?

A: Do I know?

Q: Yes.

A: I don't know. I wasn't there. I didn't hear about it. I didn't see about it until it came out in the newspaper, God knows, how long afterwards. And not for 15, 20 years later I didn't know, no, didn't know a thing about it.

2nd Feldman Dep., at 352-355 (emphasis added). It was only later in Feldman's deposition that he appeared to admit having administered LSD to plaintiff, and it is the discrepancy between Feldman's remarks at various times that forms the crux of this question as placed before the court. *See* 2nd Feldman Dep., at 428- 435 (*supra* pp 5-6).

C. *Evaluation of Competing Claims*

The principal difficulty in evaluating plaintiff's motion for summary judgment on the issue of his LSD drugging here arises from the fact that the plaintiff and defendant rely most heavily upon the same witness. Ira Feldman, the admitted CIA operative and one-time MKULTRA participant, stands at the very center of this case, and the question of which version of his story to believe forms the crux of this court's inquiry. On

multiple separate occasions during his first and second depositions Feldman denied--under direct questioning--that he had participated in any drugging of Ritchie, or indeed that he had ever before seen or interacted with Ritchie. However, during his first deposition Feldman denied *ever administering drugs to unwitting suspects*, a denial that Feldman himself and others have since convincingly refuted. *See, e.g.,* 1st Feldman Dep., at 36 ("Q. Mr. Feldman, did you ever witness anybody slipping LSD to another person? A. Never did. Q. Did you ever slip LSD to another person? A. Never did. Never did."); *id.* at 245 ("Q. Did you ever slip LSD into anybody's drinks? A. Never did."); 2nd Feldman Dep., at 432 ("Q. So that every time that you gave somebody LSD, Sidney Gottlieb was along? A. No, he wasn't along. But he most likely knew these people."). Like the thirteenth chime of a broken clock, the demonstrably incorrect statements in Feldman's first deposition cast doubt upon all those that preceded them.

However, Feldman's denials at the beginning of his second deposition are no more equivocal. At the beginning of Feldman's second deposition, plaintiff's counsel showed Feldman a transcript of an interview that Feldman had given in which he admitted to having administered LSD to numerous non-consenting individuals. *See* 2nd Feldman Dep., at 345-46. Confronted with this evidence, Feldman lacked a compelling reason to continue to lie about his involvement with MKULTRA and could hardly perpetuate his denials with any semblance of credibility. It thus remains significant that, at least at first, he continued to resolutely deny ever having drugged Wayne Ritchie.

By comparison, the statements that appear to implicate Feldman in Ritchie's alleged drugging do so only obliquely: Feldman compares Ritchie's psychotic episode to the actions of an LSD victim without stating positively and explicitly that he knew Ritchie to have consumed LSD. *See* 2nd Feldman Dep., at 428-429 ("You just back away and let them worry like this nitwit, Ritchie.... Let them have a full head, like what

happened, like what happened with this nut when he got out and got drunk."); *id.* at 435 (identifying Ritchie as an LSD victim by saying "[t]he bird, like this guy, who saw snakes coming out, he deserved to suffer [from having had LSD administered]. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone."). From the first moment of his deposition Feldman undoubtedly knew that Wayne Ritchie was alleging that he had been drugged with LSD; Feldman might easily have assumed that Ritchie's drugging was a foregone conclusion, and that the only remaining question concerned whether Feldman had participated in that drugging himself. In fact, Feldman's first putative self-implication came directly after plaintiff's counsel had referenced a San Francisco Chronicle article entitled "Good Guy Fails as Bad Guy" written in 1957 about Ritchie's attempted armed robbery. *See* 2nd Feldman Dep., at 427-28. The nature of Feldman's subsequent remarks--whether the reference to Ritchie's robbery triggered an unconscious admission or merely induced Feldman to offer a needless and unfortunate comparison--remains shrouded in uncertainty. Nevertheless, it is inescapable that other explanations beyond Feldman's guilt exist to explain his remarks.

It is also noteworthy that on no occasion did plaintiff's counsel follow Feldman's allusions to Ritchie with more direct questioning designed to pin down precisely what Feldman intended to be saying.[6] The absence of such questioning

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[6] Plaintiff protests that the obdurate behavior of defendant's counsel is to blame for his inability to ask such a follow-up question, and indeed the record of Feldman's deposition appears to support this contention. The most notable interruption came as Feldman appeared to be implicating himself in Ritchie's drugging for the third time:

A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy, who saw

snakes coming out, he deserved to suffer. He had eight or ten drinks and then goes out and gets a couple of guns and tries to hold up someone. And then he waits--
MS. KENNEY [defendant's counsel]: Mr. Feldman--
MR. BENDER [plaintiff's counsel]: He is answering the question. I object to your doing that at a critical time like this. You have some nerve to interrupt that witness now. That's horrible.
MS. KENNEY: He appears to be spacing out.
MR. BENDER: He is not spacing out. You may be spacing out because of the testimony he is giving.
MS. KENNEY: The video will show it.
MR. BENDER: It sure will.
MS. KENNEY: Go ahead.
MR. BENDER: Will you pick up where he left off? Will you read it to him?
MS. KENNEY: We have been sitting here since-- MR. BENDER: We are in the middle of an answer
MS. KENNEY: We have been sitting here since 1 o'clock this afternoon. At a convenient time we will take a break.
MR. BENDER: We had a break.
MS. KENNEY: You tell me when it is convenient. But sometime between now and 4:00.
MR. BENDER: Who do you think you are, to interrupt this witness like that at a critical time? You know what you are doing.
MS. KENNEY: Excuse me. I don't agree with you that it is at a critical time.
MR. BENDER: You know. That is why you did it.
MS. KENNEY: I don't agree with you.
MR. BENDER: Of course you don't.
MS. KENNEY: Do you want the reporter to read it back?
MR. BENDER: Please give him his answer as he is giving it.

certainly does not eviscerate the potential veracity of plaintiff's asseverations regarding Feldman's admissions, but nonetheless it leaves this court in the position of essentially inferring facts from sideways comments, rather than explicit testimony. Plaintiff thus can hardly be surprised when this court finds it difficult to grant summary judgment on such grounds.[7]

(Record read).

Q. Do you want to continue?

A. No. That's it. That's all I remember.

Q. Can you give us some instances, when you were working with White, about who should be drugged?

A. No. I couldn't give you any instances at all. MR. BENDER: Okay. Let's take a break.

2nd Feldman Dep., at 435-38. Plaintiff is correct that defense counsel interfered improperly with his attorney's deposition of Ira Feldman, and that these interruptions may well have denied plaintiff the opportunity to solicit further valuable testimony. Nevertheless, plaintiff's counsel never pressed this issue by asking Feldman again if he had drugged Wayne Ritchie and then pointing to his earlier testimony were he to again deny the charge.

[7] Feldman's potentially contradictory replies add to this summary judgment motion an issue of credibility. Feldman's more explicit denials of having drugged Ritchie cannot help but cast doubt upon his subsequent references to involvement in those same alleged acts. At the same time, this court allowed plaintiff to take Feldman's deposition twice precisely because new information had come to light that might allow the plaintiff to elicit more useful--or even more truthful--information from Feldman. The circumstances present a conundrum for any fact-finder tasked with determining which of Feldman's several conflicting recitations of history to believe. Fortunately, this task does not permissibly fall to the court at this stage. This court may not make credibility determinations in the context of a motion for summary

Plaintiff also urges this court to consider his aberrant behavior on the night of December 20, 1957--and his expert's diagnosis attributing this behavior to ingestion of LSD--when deciding his motion for summary judgment on the issue of whether the CIA did, in fact, drug him. Meanwhile, defendant's cross-motion for summary judgment raises the separate issue of whether plaintiff can prove causation, viz., that his robbery attempt was caused by LSD and not alcohol or some other catalyst. The question of causation, and the differing assessments offered by plaintiff and defendant's experts, are thus discussed in detail in the sections that follow, and the court will not recapitulate ("pre-capitulate") them here. For present purposes, it suffices only to state that these diagnoses are themselves sufficiently divided (and divided in a manner that this court cannot resolve in the context of cross-motions for summary judgment) that they add little to the analysis at this stage.

In addition, plaintiff's expert reached his conclusion attributing plaintiff's robbery attempt to the ingestion of LSD in large degree because of the separate accusations (and supporting evidence) that plaintiff had been unwittingly administered that drug. Absent such allegations and background, and faced with merely a cold medical record, it seems unlikely that plaintiff's expert would have independently fixed upon LSD as the precise cause of plaintiff's actions, eliminating from consideration all other potential psychological factors.[8] Thus, it is largely circular

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judgment. *Anderson*, 477 U.S. at 249.

[8] Indeed, as described further below, plaintiff's expert opines that Wayne Ritchie was under the influence of a "pharmacological agent," not that he was specifically administered LSD.

for plaintiff to attempt to buttress his allegation of CIA drugging with an expert assessment that itself draws heavily upon that same allegation; plaintiff's expert's various reports heavily reference Ritchie's allegations from this action. *See, e.g.*, Ketchum Reply to Abraham Rep., at 12 ("Turning to Mr. Ritchie's belief that he was drugged with LSD by the CIA, this is not an idle fantasy or a delusion lacking real-world foundation....").

Unsurprisingly, plaintiff and defendant paint substantially different pictures of the events of December 20, 1957, pictures that incorporate both direct testimony and the opinions of experts writing forty-five years after the fact. In light of these divergent perspectives, the opinions offered by each party's experts do not shed substantially new light on--nor force a substantial re-evaluation of--the factual questions that existed in the first place. By consequence, the testimony of Ira Feldman remains the singularly salient source of evidence on this issue.

Whatever else they may indicate, Feldman's disparate assertions certainly do not constitute such an overwhelming body of evidence that no reasonable juror could find other than that Ritchie was an unwitting victim of CIA Subproject 42. The lack of a direct, positive statement by Ira Feldman that he did, in fact, participate in (or at least knew of) Ritchie's drugging is most significant here. Without a clear, categorical admission of involvement by Ira Feldman it is simply impossible for this court to conclude that no reasonable juror could find against plaintiff; under such circumstances, and in the absence of such evidence, summary judgment for plaintiff is improper. *Anderson*, 477 U.S. at 248. At the same time, however, Feldman's sideways assertions do raise at least a triable issue of fact on this question--faced with Feldman's contradictions and the possibility that he may have truthfully, though unwittingly, inculpated himself, a reasonable jury would be capable of finding for plaintiff. Motions for

summary judgment on fact issues such as these do not ask the court for its best judgment on the veracity of a claim; the court's only role is to eliminate issues of fact upon which there can be no reasonable disagreement. Despite the vagaries of Feldman's responses--and his repeated unequivocal denials of involvement--this is an issue about which reasonable jurors might well disagree. The court hereby denies both plaintiff's and defendant's motions for partial summary judgment on the issue of whether "Wayne Ritchie was an unwitting victim of CIA Subproject 42."

III. *LSD Causation*

Defendant has moved for summary judgment on the issue of whether plaintiff has adduced sufficient evidence to present a triable issue of fact regarding the question of whether his behavior on the night of December 20, 1957, was in fact due to ingestion of LSD. Both sides agree that plaintiff suffered a brief psychotic episode that night that resulted in his attempted robbery of the Shady Grove Bar. *See, e.g.*, Gottlieb Rep., at 17 ("Brief Psychotic Disorder on December 20 1957"); Ketchum Rep., at 10 ("It is certainly appropriate ... to regard Wayne's episode as a temporary psychotic disorder."). Defendant has introduced the declarations of two psychiatric experts, Dr. Kenneth I. Gottlieb, M.D., and Dr. Henry D. Abraham, M.D., both of whom opine that plaintiffs' actions and symptoms were more likely caused by the alcohol he ingested than by any potential doping with LSD.[9] Plaintiff relies upon the declaration of Dr. James S. Ketchum, M.D.,

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[9] Dr. Abraham conducted a psychiatric examination of plaintiff in March of 2003. Dr. Gottlieb never examined plaintiff personally; he relied solely upon the written record in this case and the videotape of Dr. Abraham's examination.

another psychiatric expert, who argues that Ritchie's psychotic episode was most likely caused by LSD, rather than alcohol, in part because Ketchum does not believe that Ritchie would have been substantially affected, either on a short- or long-term basis, by the alcohol that he did consume. This case is made particularly difficult by the more than forty years that elapsed between Ritchie's psychotic episode and the psychiatric examinations used here to provide proof of causation (or lack thereof). Nevertheless, the court can only proceed with the evidence before it and weigh if carefully considering the length of time that has passed.

A. *Defendant's Principal Proffered Facts*

Defendant's motion for summary judgment centers on the claim that Ritchie's behavior was caused by both his near-term and long-term drinking. Ritchie was, by all accounts, a regular and occasionally heavy drinker. *See, e.g.,* Abraham Rep., at 7 ("The plaintiff admits a past history of the excessive consumption of alcohol."); *id.* at 8 ("The plaintiff qualifies on [the Michigan Alcohol Screening Test] scale as a problem drinker at least during the years 1949 through 1957."). Three separate times within the years preceding 1957, Ritchie had consumed as many as 15 to 25 drinks during one evening. Ketchum Reply to Abraham Rep., at 6. On Friday, December 20, 1957, Ritchie consumed approximately eight bourbon and sodas, beginning around noon at the Christmas party in the Post Office Building and ending that evening at approximately 9:00 pm with his attempted robbery. Ritchie Dec. ¶ 4-10; Abraham Rep., at 3. The majority of this drinking occurred between 2:00 and 3:15 pm, upon Ritchie's second visit to the allegedly fateful Christmas party, where he consumed three to four bourbons. Ritchie Dec. ¶ 6.

Dr. Gottlieb bases his conclusion that Ritchie could not have been drugged with LSD on two principal factors. First, he notes that Ritchie did not seem to display the indicia of one

who had been administered such a hallucinogen. He did not hallucinate. Gottlieb Rep., at 3. He did not experience excess sweating, blurred vision, shaking, or loss of coordination, and there is no mention of Ritchie having dilated pupils; according to Dr. Gottlieb, all of these are regularly documented symptoms of LSD use. *Id.* In addition, Dr. Gottlieb notes that "the plaintiff does not describe psychiatric afflictions characteristic of the post-LSD period." *Id.* at 4. In sum, Dr. Gottlieb concludes, "the plaintiff describes virtually none of the classical mental or physical features of the acute drug state." *Id.* at 13. Second, Dr. Gottlieb claims that an LSD victim would not normally be capable of formulating a plan to commit a robbery, including taking the necessary predicate steps. as did Ritchie. Gottlieb writes that "[t]he planning and execution of a robbery, even a failed one, requires far more executive mental function than LSD ordinarily permits." *Id.* It is worth noting that Gottlieb does not claim to be offering a medical opinion that Ritchie was not given any LSD on December 20th; he believes simply that Ritchie cannot have been under the influence of LSD when he attempted to commit armed robbery. *See* Gottlieb Dec., at 60 ("Q.... Doctor, have you expressed an opinion to a reasonable degree of scientific certainty that Mr. Ritchie did not have any LSD on December 20, 1957? A. No."). Dr. Gottlieb also does not deny that LSD is a powerful narcotic, or that it may produce bizarre behavior in those who ingest it. *See id.* at 59 ("LSD can make people very, very crazy.").

Rather, according to Dr. Gottlieb, "the plaintiff's behavior is quite consistent with numerous studies in the literature associating the use of alcohol with crime." *Id.* at 14. Interestingly, Dr. Gottlieb does not claim that Ritchie was actually drunk in the classical sense of the word. Dr. Gottlieb stated during his deposition that Ritchie "wasn't behaving in a drunk manner at all." Gottlieb Dep., at 65-66. Instead, Gottlieb opines that

the condition from which ... Mr. Ritchie suffered was a

> psychotic state induced by alcohol. In the old days it would be called alcoholic hallucinosis. It is not related to being intoxicated with alcohol. It is associated with chronic alcohol ingestion, but it is not connected with alcohol intoxication.

Gottlieb Dep., at 65. Dr. Gottlieb thus does not rely upon the number of drinks that Ritchie consumed on December 20, 1957, as the causal factor for his behavior, but instead attempts to link Ritchie's actions to his longstanding consumption of alcohol.

In much the same fashion, defendant's second expert, Dr. Abraham, opines that Wayne Ritchie could not possibly have been under the influence of LSD at the time of his robbery because he did not display any of the typical physical indicia of an individual who has consumed that drug. Dr. Abraham conducted a psychiatric examination on March 31, 2003, at the United States Attorney's Office in San Francisco and formed his opinions based on his analysis of Ritchie in that forum. Abraham Rep., at 1. Abraham's conclusions are relatively straightforward:

> Physically there is no report of bodily changes characteristic of LSD. There was no mention of dilated pupils made by anyone at anytime, (including a physician treating him for a head injury later that night). The plaintiff described some palpitations. But there was no excess sweating noted, no blurring of vision, shaking, or a loss of coordination. As he shared with me, "I didn't spill any drink at all."
>
> ...
>
> In the ensuing years the plaintiff does not describe psychiatric afflictions characteristic of the post-LSD period. That is, he described no recurrent perceptual flashbacks suggesting hallucinogen persisting perception disorder, such as trailing imagery or protracted afterimagery commonly seen following the

use of LSD.

Id. at 3-4. Instead, Dr. Abraham believes that plaintiff is suffering from delusions brought on through a combination of his drinking and various of his personality traits, including "a hypersensitivity or even an imagined sense of rejection." *Id.* at 14. Dr. Abraham adds that

> [t]hese traits are consistent with a mixed personality disorder, with features of the avoidant, paranoid, and obsessive types. More to the point, they are likely to have been predisposing factors that led to the brief psychotic reaction the plaintiff appears to have suffered on under the influence of a large amount of alcohol.

Id. at 15.

B. *Plaintiff's Principal Proffered Facts*

Plaintiff's expert, Dr. Ketchum, makes a number of points by way of response to defendant's experts' contentions. Ketchum performed a so-called "differential diagnosis" upon Ritchie in which he believes he successfully dis-aggregated the various potential causal factors behind Ritchie's December 20, 1957, psychotic episode. Dr. Ketchum concludes that only LSD--not the alcohol Ritchie consumed nor any underlying neurological disease--can explain the events of that evening: "the only plausible explanation for the mental and emotional changes accompanied by the bizarre behavior shown by Mr. Ritchie on the day of his arrest is the ingestion of a pharmacological agent." Ketchum Rep., at 8. Foremost within his argument is the claim that Ritchie could not have been seriously intoxicated by the time he attempted to commit the robbery around 9:00 pm. Since Ritchie had only eight drinks in a period of nine hours, Ketchum estimates that his blood alcohol content would have been approximately 20 mg%, well

below the legal limit[10] and far too low to "produce this entire scenario" of incapacitation and robbery. Ketchum Reply to Abraham Rep., at 3-6. Notes Ketchum, "[p]harmacological studies of healthy non-alcoholic volunteers have demonstrated that this amount of alcohol is almost completely metabolized within such a time period." Ketchum Rep., at 11-12.

Ketchum also rejects the theory that Ritchie suffered from the type of long-term alcohol-induced psychosis that Dr. Gottlieb credits with causing his psychotic incident. Ketchum believes that "[t]he effects of alcohol alone do not explain the perceptual distortions, paranoid delusions, depression, poor judgment and loss of reality testing, nor the attempted commission of an illogically conceived, and ineptly executed criminal act." Ketchum Rep., at 8. Explains Ketchum further, "[a]lcohol-induced psychosis ... is associated with a *prolonged* period of heavy drinking and generally persists for *days* or *weeks* if untreated." Ketchum Rep., at 11 (emphasis in original). Ritchie's case, argues Ketchum, fulfills neither of these conditions. Argues Ketchum, "[t]here is nothing to suggest a significant alcohol problem in his pre-1957 history, nor any indication that any of his colleagues or supervisors considered him to be a problem drinker." Ketchum Reply to Gottlieb Rep., at 1- 2.

Rather than attributing Ritchie's actions to alcohol, Ketchum argues that Ritchie's behavior is entirely consistent with what might be expected of someone who had been dosed with LSD, particularly given the variability in effects that different doses administered under different conditions can produce. Noting that "the dose of LSD is unknown in this

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[10] Ketchum evidently provides this fact not because it carries any legal significance, but merely as a useful metric for describing in commonly understood terms Ritchie's level of intoxication.

case," Ketchum remarks that "[d]oses as small as 30-50mcg, which may produce no outward signs, can cause marked disturbances in thinking and emotion." Ketchum Reply to Abraham Rep., at 7. Dr. Ketchum also links Ritchie's ever-increasing paranoia[11] on the night of December 20th to ingestion of LSD: "This type of expanding delusion is characteristic of LSD effects. Once a paranoid line of thought occurs under the influence of LSD, everything else seems to corroborate it." *Id.*

Ketchum also disputes defendant's contention that an individual under the influence of LSD would be incapable of formulating the type of plan--involving several coordinate steps--that Ritchie had concocted to rob the bar at which he was eventually arrested. *Id.* Ketchum notes that his experience with LSD patients and his perception of them does not comport with Dr. Abraham's impression that they would be unlikely to commit such a crime: "A 'tongue-tied, blissed out, passive state' is certainly not typical of what I have observed in almost 100 volunteers, and dozens of Haight-Ashbury patients in 1967-68, most of whom went through a range of emotions and frequently were paranoid at times." *Id.* Finally, Ketchum takes issue with the significance that Dr. Abraham attaches to Ritchie's supposed lack of flashbacks subsequent to his alleged experience with LSD. Dr. Ketchum argues first that Ritchie "*did* have flashbacks, in the sense that a vivid reliving of the criminal behavior would suddenly occur unexpectedly while in the grocery store, painting, etc." *Id.* at 13 (emphasis in original). More to the point, Ketchum would

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[11] Ritchie claims that the driving motivation behind his commission of the robbery was his belief that "everyone was against" him, including his fellow officers, co-workers across the hall, and even people at the bars he visited. Ritchie Decl. ¶ ¶ 7-9. This paranoia only increased as the night progressed.

not consider it surprising even if Ritchie were not subject to flashbacks, since one study "has reported from a large meta-analysis that most of those who have taken LSD do not report significant flashbacks, and if they do they usually occur only for a few days or weeks." *Id.*

C. *Evaluation of Competing Claims*

Defendant urges this court to grant summary judgment on the issue of whether LSD caused Ritchie's psychotic episode, arguing that the testimony of plaintiff's expert, when compared with that of defendant's experts, does not create a substantial issue of material fact. Upon consideration of all available evidence, this question devolves into a form both familiar to--and intractable for--the courts: the cliched "battle of the experts." Adding to the traditional difficulties in analyzing expert testimony that attend any case in which experts play a significant role is the nature of the evidence presented here. Plaintiff and defendant's experts are examining Ritchie more than 45 years after the events which gave rise to this action, and much of their reportage takes the form of psychiatric evaluation. By consequence, they are forced to rely in large part upon their experience in dealing with similar patients (some of whom may have ingested alcohol or LSD) in previous situations. *See, e.g.,* Abraham Rep., at 13-14 (noting that plaintiff's behavior on the night of December 20, 1957, "does not conform to the mental state of tongue-tied, blissed-out, passive LSD cases I have observed in the last thirty years"); Ketchum Reply to Abraham Rep., at 7 (referencing his work with 100 LSD-ingesting volunteers and patients in a San Francisco clinic over thirty years ago). Moreover, they must draw conclusions based upon analogies between plaintiff's statements and a very limited knowledge foundation: there is hardly a plentiful public record of medical studies of LSD's effect on humans and nothing approaching medical consensus on the relevant issues.

This confluence of medical difficulties has rendered the experts unable to engage one another at the type of logical level that might enable this court to resolve the relevant issues on summary judgment. The parties' experts seem to lack the type of common experiences that might place their diagnoses on congruent planes; rather, they appear largely to talk past one another. It is difficult to quarrel with an expert who states that in his "extensive experience," his patients have generally behaved in a certain manner; an argument from general experience cannot be conclusively rebutted by more of the same.

Furthermore, plaintiff's expert's reasoning simply does not contain any prominent, dispositive logical gaps that defendant's experts can exploit. Dr. Ketchum has come to a well-reasoned, coherent conclusion--one that defendant's experts reasonably dispute, to be sure, but one that is not plainly incorrect or misinformed. It is not the role of this court upon a motion for summary judgment to pick between these competing experts; that task is left to the factfinder at trial. *Anderson*, 477 U.S. at 249. It remains only for this court to ascertain whether a reasonable jury could legitimately find for plaintiff on the issue of causation given the evidence presented, and on that account the court is satisfied that plaintiff's expert has made a sufficient showing to enable a reasonable jury to hold in its favor. *Id.* at 248.

CONCLUSION

For the reasons stated above, the court DENIES plaintiff's motion in its entirety, and DENIES defendant's motion in its entirety.

IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2004 WL 1161171 (N.D.Cal.)

United States District Court, N.D. California.

Wayne A. **RITCHIE**, Plaintiff,
v.
UNITED STATES of America, Defendant.

No. C 00-03940 MHP.

July 1, 2002.

Robert W. Cartwright, Kent L. Klaudt, Cartwright & Alexander, LLP, San Francisco, CA, Sidney Bender, Risa Bender, Leventritt, Lewittes & Bender, New York City, for Plaintiff.

Robert S. Mueller, III, U.S. Attorney's Office, Criminal Division, San Francisco, CA, Jocelyn Burton, U.S. Attorney's Office, Oakland, CA, Patricia J. Kenney, U.S. Attorney's Office, San Francisco, CA, for Defendants.

MEMORANDUM & ORDER

PATEL, Chief Judge.

Plaintiff Wayne A. Ritchie initially filed this action against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"), and against Robert V. Lashbrook and Ike Feldman under the First, Fourth, Fifth and Eighth Amendments to the United States Constitution. Plaintiff alleges that the Central Intelligence Agency and the Bureau of Narcotics tested psychoactive drugs on unknowing and unwitting American citizens including plaintiff during the 1950s. Plaintiff seeks twelve-

million dollars in compensatory damages as well as costs and attorneys' fees.

The court previously dismissed plaintiff's constitutional claims. The United States now moves to dismiss plaintiff's remaining claims for lack of subject matter jurisdiction. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

As explained in this court's July 12, 2001 Memorandum and Order, plaintiff, a former Deputy United States Marshal, alleges that he was unwittingly given food or drinks that were laced with lysergic acid diethylamide (LSD) or another psychoactive drug while attending a holiday party in the United States Post Office Building on December 20, 1957. Compl. ¶ 12. Following this intoxication, and after visiting several bars, plaintiff initiated an armed robbery. Compl. ¶ 15. Plaintiff was then taken into police custody where he wrote a letter of resignation. Compl. ¶ ¶ 15 & 17.

Plaintiff alleges that he was a victim of a national federal program called "MKULTRA" for the research and development of drugs to alter human behavior. Compl. ¶ ¶ 18 & 26. Plaintiff maintains that he "first suspected that he might have been surreptitiously drugged" when he read Dr. Stanley Gottlieb's obituary in the newspaper on March 15, 1999. Compl. ¶ 23. He found additional support for his suspicion in April 1999 when he read a diary entry of George White, an agent of the Bureau of Narcotics and allegedly the operating head of the CIA's "mind-altering program" in San Francisco. *See* Compl. ¶ 24; Ritchie Dep., Exh. B-12 (White was a senior employee at the San Francisco Federal Narcotics Bureau in the 1950s). White's December 20, 1957 diary entry stated, in ***1122** part, "xmas party Fed bldg Press

Room." Ritchie Dep., Exh. D; Compl. ¶ 25.[1] White was an MKULTRA subcontractor from approximately 1953 until 1964. McGinn Dec. ¶ 5. In that role, he established a safehouse apartment in San Francisco where drug tests were conducted on drug informants and prostitutes. *Id.*

Defendant has produced an extensive record of newspaper and television coverage documenting federal mind-control experimentation. *Id.*, Exhs. A-C (newspaper articles) & X (books). Plaintiff denies having seen most of these exhibits before 1999. Ritchie Dep. 170-71; Ritchie Dec. (April 30, 2002) ¶ ¶ 3 & 4. He does, however, indicate that he read an article about the government's research in 1977. Ritchie Dep. at 22-23, 26, 197-210, 283-84. This article reports that it was a customary practice of the research project to examine the effects of involuntary drug exposure on prostitutes. *See id.* Exh. B-12. Notably, the article does not mention LSD. *Id.*

Plaintiff filed a Notice of Claim with the Central Intelligence Agency ("CIA") and the Drug Enforcement Agency ("DEA") on October 22, 1999 as required by the Federal Tort Claims Act ("FTCA"). Those claims were denied on April 26, 2000. He filed a complaint with this court on October 25, 2000. Defendants answered the complaint on March 2, 2001. Plaintiff does not appear to have filed a claim with the Secretary of Labor as required by the Federal Employment Compensation Act ("FECA").

On July 12, 2001, the court granted defendants' motion to dismiss plaintiff's constitutional claims for failure to satisfy California's one-year statute of limitations for personal injury actions. The court denied defendants' motion to dismiss plaintiff's FTCA claims, finding that the record did not

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[1] The full entry reads: "home sick. xmas party Fed bldg Press Room." Ritchie Dep., Exh. D.

indicate that these claims were similarly time-barred.

The United States filed a second motion to dismiss or, in the alternative, for summary judgment on March 20, 2002. This motion challenges plaintiff's claims on four grounds. First, defendant contends that plaintiff's FTCA claims are barred by FECA. In the alternative, defendant maintains that plaintiff's claims are excluded from the FTCA because they contemplate intentional acts. Third, defendant argues that plaintiff's FTCA claims are time-barred. Finally, defendant contends that plaintiff's FTCA claims are barred by laches. The court addresses each in turn.

LEGAL STANDARD

I. *Federal Rule of Civil Procedure Rule 12(b)(1)*

Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either "facially" or "factually." *Thornhill Publishing Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir.1979).

In considering a motion to dismiss for lack of subject matter jurisdiction, the court must accept all of plaintiff's factual allegations as true. *See Dreier v. United States*, 106 F.3d 844, 847 (9th Cir.1996). Unlike a 12(b)(6) motion, however, the court may assess the complaint's jurisdictional allegations by relying on affidavits or any other evidence properly before the court. *Id.; see also Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) ("[W]hen a question of the District Court's jurisdiction is raised ... the court may inquire, by affidavits or otherwise, into the facts as they exist."). All disputes are resolved in favor of the non-moving party. *See Dreier*, 106 F.3d at 847.

II. *Motion for Summary Judgment*

Defendant contends that plaintiff filed his complaint beyond the FTCA's time limitation and should therefore be dismissed. Where the facts and dates alleged in a complaint demonstrate that the complaint is barred by the statute of limitations, a Federal Rule of Civil Procedure 12(b)(6) motion should be granted. *See* Fed.R.Civ.P. 12(b)(6); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980). However, where the relevant dates are not evident in the complaint, the court may consult evidence outside the complaint, converting a motion to dismiss to a motion for summary judgment. *See* Fed.R.Civ.P. 12(b)(6) ("if ... matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."); *see also Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532-33 (9th Cir.); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1366.

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

The court may not make credibility determinations, *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505, and the inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th

Cir.1987).

DISCUSSION

I. *FECA Exclusivity*

Defendant argues that the exclusivity provision of the Federal Employees' Compensation Act ("FECA") bars plaintiff from bringing a claim under the Federal Tort Claims Act ("FTCA"). 5 U.S.C. § 8116.

FECA, 5 U.S.C. § § 8101-8193, provides an efficient remedy for federal employees who are injured in the course of their employment. *See Reep v. United States,* 557 F.2d 204, 207 (9th Cir.1977) (FECA intended to provide a "quicker and more certain recovery than could be obtained from tort suits based on common law theories."). Where applicable, employees bring a claim to the Secretary of Labor, in lieu of a common law claim in federal court. Where the Secretary determines that the employee sustained an injury in the performance of his duty, the employee is awarded immediate, fixed benefits, regardless of fault. The Secretary's determination is final and may not be reviewed by a federal court. 5 U.S.C. § 8128(b).

[1][2] FECA provides the exclusive remedy for an injury within its coverage. 5 U.S.C. § 8116(c). Thus, if a federal employee is injured in the course of his employment, the court lacks subject matter jurisdiction over any claim brought under the FTCA. *See Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81, 90, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991); *United States v. Demko,* 385 U.S. 149, 151, 87 S.Ct. 382, 17 L.Ed.2d 258 (1966). If there is a substantial question about FECA coverage, an injured employee may not commence a tort action against the United States before exhausting FECA's administrative remedies. *See David v. United States,* 820 F.2d 1038, 1043- 44 (9th Cir.1987).

[3] Defendant urges the court to dismiss this action, contending that there is a substantial question about FECA coverage. A substantial question exists unless it is certain that the Secretary would deny coverage under the Act. *Bruni v. United States*, 964 F.2d 76, 79 (1st Cir.1992); *DiPippa v. United States*, 687 F.2d 14, 16 (3d Cir.1982); *White v. United States*, 143 F.3d 232, 234 (5th Cir.1998). Because the court concludes plaintiff's injuries were not sustained while in the performance of his duty as a federal employee, it need not defer to the Secretary.[2]

FECA provides coverage for a plaintiff's injuries incurred "in the performance of his duties." 5 U.S.C. § 8102(a). A plaintiff's injuries arise in the performance of his duties if related to the special zone of danger created by an obligation or condition of employment. *See, e.g., O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 506-7, 71 S.Ct. 470, 95 L.Ed.

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[2] Plaintiff challenges FECA's applicability, highlighting the act's intoxication exclusion. *See* 5 U.S.C. § 8102(a)(3) (excluding claims for any injury that is "proximately caused by the intoxication of the injured employee"). Plaintiff's reliance on section 8102(a)(3) is mistaken. This exclusion is intended to bar coverage for injuries "arising out of an employee's misconduct." *In re Elizabeth Hallaran*, 43 ECAB 391, 394 (1992). To this end, the Act excludes voluntary intoxication. *Id.* (excepting employee's intentional inhalation of chloroform). Plaintiff alleges that he was intoxicated by the involuntary ingestion of LSD. Barring FECA coverage for his claims would turn the statute on its head. *See In the Matter of Charles G Williams*, 35 ECAB 614 (upholding FECA coverage for unwitting lead intoxication); *In the Matter of Lonnie Lee Whisenhunt*, 32 ECAB 1892 (1981) (upholding FECA coverage for unwitting intoxication from manganese fumes released during welding). Nonetheless, the court need not defer to the Secretary of Labor because plaintiff's injuries were not incurred in the performance of his duties as a Deputy United States Marshal.

483 (1951); *Bruni*, 964 F.2d at 79; *Wright v. United States*, 717 F.2d 254 (6th Cir.1983); *Wallace v. United States*, 669 F.2d 947, 952 (4th Cir.1982); *Avasthi v. United States*, 608 F.2d 1059, 1061 (5th Cir.1979).[3] To make this determination, the court must consider "whether under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is to be performed, and the resultant injury." *Wallace*, 669 F.2d at 953 (quoting *In re Estelle M. Krasprzak*, 27 ECAB 339, 342 (1979)); *Leo Boyd Purrinson & U.S. Post Office*, 30 ECAB 644 (1979) (requiring causal relationship between the employment and resultant injury); *see also Bruni*, 964 F.2d at 79 (considering "the totality of the circumstances surrounding [the injury]"); *White*, 143 F.3d at 235 (requiring consideration of "all relevant factors").

Defendant states simply that "plaintiff was injured while performing his duties."[4] Def.'s Mot. at 11. Absent further explanation, the court assumes this conclusion is based on the fact that plaintiff was a federal employee injured on government property during working hours. None of these factors is dispositive. *See Wright*, 717 F.2d 254 (no FECA

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[3] Although *O'Leary* considered the applicability of the Longshoreman's and Harbor Worker's Compensation Act, the analysis is the same under FECA. *See Bailey v. United States*, 451 F.2d 963, 967 (5th Cir.1971); *Wallace v. United States*, 669 F.2d 947, 952 n. 4 (4th Cir.1982)

[4] Defendant's statement is conclusory. Defendant does nothing more than provide a history of FECA and emphasize the deference afforded the Secretary of Labor. Def.'s Mot. at 10-11. Defendant utterly fails to explain how plaintiff's injury was within the zone of danger of his employment. Contrary to defendant's suggestion, the FECA exclusivity provision by no means applies to every claim brought by a federal employee. Because defendant failed to support its conclusion, the court is left to divine defendant's faulty reasoning on its own.

coverage, notwithstanding fact that plaintiff was a federal employee injured during working hours); *White*, 143 F.3d at 235 ("[L]ocation of the accident is only one of the factors to be considered in determining whether a substantial question of coverage exists."); *Wallace*, 669 F.2d at 952 ("The mere fact that the injury occurred while the employee was on the premises of his federal employer is not controlling"; no FECA coverage although injury occurred during business hours) (citation omitted); *Avasthi*, 608 F.2d at 1061 ("[P]remises rule is but one factor in determining whether an injury is compensable.").

At oral argument, defendant offered a novel theory supporting FECA coverage of plaintiff's injuries. Apparently, plaintiff has suggested that George White placed LSD in his food or drink to avenge a fight with plaintiff's supervisor. By this theory, plaintiff was injured *because* he was a Deputy United States Marshal. The injury was thus within the zone of danger of his employment. The court rejects this argument as mere conjecture.

Given the national scope of defendant's activities, the court is hard-pressed to find that plaintiff's injury was "causally related" to his employment. *See* *Wallace*, 669 F.2d at 952 (denying FECA coverage to a federal employee who had an adverse reaction to a vaccine administered as part of a national flu inoculation program). MKULTRA was a national program. *See* *CIA v. Sims*, 471 U.S. 159, 162, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985) (noting that the CIA "financed a wide-ranging project ... consist[ing] of some 149 subprojects" requiring the participation of "[a]t least 80 institutions and 185 private researchers"); *see also* *Kronisch v. United States*, 150 F.3d 112, 117 (2d Cir.1998) (describing "substantial programs for the testing and use of chemical and biological agents ... [on] unwitting nonvolunteer subjects at all social levels, high and low, native American and foreign"). In fact, defendant has amply demonstrated the prevalence of the CIA's mind-control experimentation. *See, e.g.*, Ritchie

Dep., Exhs. A-C & X; Def.'s Reply at 12 (documenting an "overwhelming amount of information about CIA testing with mind control drugs"). That plaintiff's alleged injuries occurred on federal property was fortuitous; he could just as easily have been injured elsewhere. *See Kronisch*, 150 F.3d at 118 (MKULTRA involved the "surreptitious administration [of LSD] to unwitting nonvolunteer subjects in normal life settings") (quoting Senate committee report); *CIA v. Sims*, 471 U.S. at 162 n. 2, 105 S.Ct. 1881. (same).

Moreover, the totality of the circumstances indicate that plaintiff's injury did not occur in the course of his employment. Plaintiff alleges that he was unwittingly drugged by the federal government at a holiday party on federal property during business hours. Plaintiff could not have contemplated the alleged injury when he accepted federal employment. *See Wright*, 717 F.2d at 258 ("negligent application and use of a respirator is not an expected consequence of being within the special zone of danger which surrounds secretarial positions at Veterans Administration hospitals"); *see also Wallace*, 669 F.2d at 954 (compensation unavailable under FECA when the injury had nothing to do with employment).[5] To find these fantastic injuries occurred in the performance of plaintiff's duties stretches the zone of

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[5] While the court doubts that the drugging of an employee by the CIA would be within the zone of danger of employment in any event, it is even less likely that such activity would be covered when it occurred during a holiday party. The court was unable to find a single ECAB decision finding coverage for injuries incurred at a holiday party. The only case cited by defendant for this proposition denied FECA coverage, but suggested in dicta that compensation would have been possible if plaintiff's injuries had occurred at a party organized by the employment establishment while on temporary service duty abroad. *Janice K. Matsumura*, 38 ECAB 262, 266 (1986).

danger beyond its limits. Accordingly, the court finds that plaintiff's injury did not arise in the performance of his duties.

The court's determination is unaffected by Deputy Director Edward G. Duncan's contrary conclusion. *See* Duncan Dec. (Mar. 4, 2002); Duncan Supp. Dec. (May 17, 2002). Admittedly, the court may consider a declaration on a 12(b)(1) motion to dismiss.[6] [FN6] *See* Rosales v. United States, 824 F.2d 799 (9th Cir.1987) ("A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits.") (citations omitted); Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.1983) ("In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial"). Nonetheless, the court strikes the declaration. It is not a formal policy interpretation of a regulation, but merely a self-serving declaration prepared for this litigation. *See* Hines v. United States, 60 F.3d 1442, 1450 n. 8 (9th Cir.1995) ("Eng's declaration is, of course, self-serving because it was given after the accident and in light of the current lawsuit"); United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir.1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."). Moreover, as discussed above, Duncan's conclusion "fl[ies] in the face of simple logic and relevant judicial precedent." Wallace, 669 F.2d at 954 (declining to follow the government's statutory interpretation); *see also* Hines 60 F.3d at 1450 (disregarding a declaration because its

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[6] Plaintiff's reliance on Buehler v. United States, 1996 WL 511645, *2 n. 2 (N.D.Cal.1996), is misplaced. That action involved a motion to dismiss for failure to state a claim, rather than a motion to dismiss for lack of subject matter jurisdiction.

"interpretation of the regulation is manifestly unreasonable and deserves no controlling weight.").

Because the court concludes that the facts of this action do not support FECA coverage, it need not consider scope of coverage. Thus, at least at this stage, the court need not decide whether plaintiff's alleged emotional and physical injuries are interconnected. *See* Sheehan v. United States, 896 F.2d 1168 (9th Cir.1990) (no FECA coverage when emotional injury divorced from physical harm); *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir.1993) (finding possible FECA coverage where plaintiffs' emotional damages were "tied to physical harm").

In sum, the court holds that plaintiff's injuries did not arise out of the special zone of danger created by an obligation or condition of his employment. There simply is not a substantial question of FECA coverage. Therefore, the court has jurisdiction to entertain plaintiff's FTCA claims.

II. *28 U.S.C. § 2680(h)*

Defendant contends that plaintiff's claims are barred by the FTCA, 28 U.S.C. § 2680(h), which bars coverage for a subset of intentional torts. The complaint seeks damages under the FTCA for negligent supervision, Compl. ¶ 37, invasion of ***1127** privacy, Compl. ¶ 39, and intentional infliction of emotional distress, Compl. ¶ 41. Defendant contends each claim arises from the alleged battery of plaintiff when he was purportedly given LSD by the government. Battery was expressly excepted from the FTCA in 1957.

Contrary to defendant's suggestion, Def.'s mot. at 11, not all intentional torts are excepted from the FTCA. For instance, the Ninth Circuit has expressly recognized that "intentional infliction of emotional distress is not excluded as a matter of law from FTCA by § 2680(h)." *Sheehan*, 896 F.2d at 1172.

[4][5] Although the FTCA excepts a subset of intentional torts, these exceptions should be strictly construed. *Id.* at 1170 ("[t]here is no justification for this Court [or any court] to read exemptions into the [Federal Tort Claims] Act beyond those provided by Congress.") (quoting *Rayonier Inc. v. United States*, 352 U.S. 315, 320, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957)). While one aspect of the government's conduct may be excluded from the FTCA, other aspects of that conduct are actionable. *Id.* at 1171 ("If ... the aspect of the conduct upon which plaintiff relies did not constitute an assault, suit is not barred even though another aspect of that conduct may have been assaultive."). Plaintiff may bring a claim for negligent supervision, notwithstanding the fact that other components of the act involve an intentional tort. *Id.*

In fact, FTCA claims for negligent supervision often accompany intentional torts. *See, e.g., Brock v. United States*, 64 F.3d 1421 (9th Cir.1995) (alleging negligent supervision leading to employee's rape); *Bruni*, 964 F.2d 76 (1st Cir.1992) (alleging negligent supervision in employee's shooting). The "assault and battery exception [in section 2680(h)] does not immunize the Government from liability for negligently hiring and supervising an employee." *Brock*, 64 F.3d at 1425.

Notably, MKULTRA complaints traditionally sound in negligence. *Kronisch v. United States*, 150 F.3d 112, 120 (2d Cir.1998) (suit brought under FTCA alleging negligence, invasion of privacy and intentional infliction of emotional distress); *Orlikow v. United States*, 682 F.Supp. 77 (D.D.C.1988) (FTCA action alleging negligent failure of supervision and control over CIA employees and negligent funding of hazardous experiments); *Glickman v. United States*, 626 F.Supp. 171 (S.D.N.Y.1985) (FTCA action alleging negligence, invasion of privacy and intentional infliction of emotional distress); *Scott v. Casey*, 562 F.Supp. 475 (N.D.Ga.1983) (challenging MKULTRA under the FTCA); *see also Barrett v. United States*, 689 F.2d 324 (2d.

Cir.1982) (FTCA action alleging negligence in creation and administration of army chemical warfare experiment involving intentional injection of a mescaline derivative). As the district court recognized in *Orlikow v. United States*, 682 F.Supp. at 82, "selecting incompetent contractors or employees and supervising them in a careless manner are acts of negligence pure and simple."

[6] Defendant's argument is not new. In *Glickman*, the government likewise challenged plaintiff's claims for impermissibly arising from battery. *Glickman*, 626 F.Supp. at 174 (referring to alleged inadequacy of administrative claim). The court dismissed the criticism, finding the complaint contemplated a "covert CIA plan to infringe the rights of citizens" and various other legal theories. *Id.* The tenuous connection to an intentional tort was not determinative. The negligence claims remained on appeal. *Kronisch*, 150 F.3d 112 (action by Glickman's executrix). The FTCA claims in *Glickman* were nearly identical to those in this action. *See* Bender Dec. (Apr. 20, 2002) ¶ 3.[7] This court likewise declines to dismiss plaintiff's complaint.

III. *Statute of Limitations*

Defendant contends that plaintiff's FTCA claims are time-barred. "[W]here the issue of limitations involves determinations [of when a claim begins to accrue], summary judgment cannot be granted unless the evidence is so clear that there is no genuine factual issue." *Lundy v. Union Carbide Corp.*, 695 F.2d 394, 397-98 (9th Cir.1982) (quoting *Williams v. Borden, Inc.*, 637 F.2d 731, 738 (10th Cir.1980)). Defendant has not met this burden. Summary judgment must

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[7] The Second Circuit ultimately dismissed these claims for failure to satisfy the statute of limitations, not for violation of section 2680(h). *See also Scott*, 562 F.Supp. 475 (N.D.Ga.1983) (dismissing negligence claims as time-barred).

be denied.

The FTCA provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues" *See* 28 U.S.C. § 2401(b); *see also* *Bartleson v. United States*, 96 F.3d 1270, 1276 (9th Cir.1996). Plaintiff filed his administrative claim with the CIA and the DEA on October 22, 1999. Accordingly, plaintiff's FTCA claim against the government is untimely if it accrued prior to October 22, 1997.

Although a tort claim generally accrues at the time of injury, *Davis v. United States*, 642 F.2d 328, 330 (9th Cir.1981), courts have applied a more liberal standard where the government conceals the acts giving rise to the claim or where plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted. *See Kronisch*, 150 F.3d 112, 121 (2d Cir.1998). In such cases, "the claim does not accrue until the plaintiff knows or in the exercise of reasonable diligence should know of both the injury and its cause." *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir.1984); *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (cause of action did not accrue until plaintiff discovered both the existence of his injury and its cause).[8] It is undisputed that the government did not tell plaintiff he was a victim of MKULTRA at the time of his injury. To the contrary, the

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[8] Contrary to defendant's suggestion, the diligence-discovery rule is not restricted to medical malpractice. *See, e.g., Dyniewicz v. United States*, 742 F.2d 484 (9th Cir.1984) (flooding of federal road); *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir.1982) (diligence-discovery rule is appropriate "where a plaintiff demonstrates that his injury was inherently unknowable at the time he was injured" or "where the Government conceals its negligent acts so that the plaintiff is unaware of their existence.").

government destroyed MKULTRA documents in the 1970s. *CIA v. Sims*, 471 U.S. 159, 163 n. 5, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985) ("Twenty years after the conception of the MKULTRA project, all known files pertaining to MKULTRA were ordered destroyed."); *Kronisch v. United States*, 150 F.3d 112, 116 (2d Cir.1998) (same). In light of this concealment, the diligence-discovery rule is clearly applicable.

[7] Thus, plaintiff's claim began to accrue when plaintiff knew of both his injury and its cause. As defendant recognizes, the Ninth Circuit has consistently found that plaintiff need not know the identity of the person who caused his injury to trigger the statute of limitations. *See Dyniewicz*, 742 F.2d at 486 ("Discovery of the cause of one's injury, however, does not mean knowing who is responsible for it."); *see also In re Swine Flu Prod. Liab. Litig.*, 764 F.2d 637, 640 (9th Cir.1985) ("The 'cause' is known when the immediate physical cause of the injury is discovered."). In *Gibson v. United States*, 781 F.2d 1334 (9th Cir.1986), the Ninth Circuit held plaintiffs' claim accrued when they knew their property had been destroyed by fire. It was irrelevant that plaintiffs were unaware of the government's complicity in this action. Similarly, in *Dyniewicz*, 742 F.2d at 487, plaintiffs' claim accrued when they knew their injury was caused by a flooded highway, notwithstanding their ignorance about the government's negligence. Ritchie knew of his injury (intoxication) in 1957. Accordingly, plaintiff's claim accrued once he knew of its physical cause--ingestion of LSD. Plaintiff's "ignorance of the involvement of United States employees is irrelevant." *Dyniewicz*, 742 F.2d at 487.[9]

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[9] Plaintiff's reliance on *Bibeau v. Pacific N.W. Res. Found., Inc.*, 188 F.3d 1105, 1108 & n. 2 (9th Cir.1999), is inappropriate. Although *Bibeau* states that the statute of limitations "begins to run once a plaintiff has knowledge of the 'critical facts' of his injury, which are 'that he has been hurt and *who has inflicted the injury.*' "

The court recognizes the likelihood that plaintiff's discovery of both the physical cause of his injury and the role of the government would have been contemporaneous. A reasonable person who had never used LSD would not think he had been exposed to it. It is quite possible this thought would not have entered plaintiff's mind absent knowledge that the government was giving LSD to unwitting civilians.

Plaintiff maintains that he did not have reason to believe his injury was caused by LSD until he read Dr. Gottlieb's obituary in March 1999. Because there is no evidence that plaintiff actually knew the cause of his intoxication, the government's statute of limitations defense ultimately turns on whether he failed to exercise due diligence in discovering it.

Defendant emphasizes the extensive coverage of MKULTRA in literature and the media since the 1970s. *See* Ritchie Dep., Exhs. A-C (various articles) & X (listing books); CBS, NBC, ABC nightly news segments (filed by defendant, Mar. 4, 2002). The mere existence of these materials, however, does not mean that plaintiff should have seen them. *Bibeau v. Pacific N.W. Res. Found. Inc.*, 188 F.3d

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(emphasis added) (quoting *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)), the identity of the defendant was not at issue in *Bibeau*. Thus, the latter part of this statement was dictum. *See Clavette v. Sweeney*, 132 F.Supp.2d 864, 874 (D.Or.2001) (so holding). Allowing this construction would extend *Kubrick* in a manner previously rejected by the Ninth Circuit. *See Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir.1986) (citing *Kubrick* for the limited proposition that "under the FTCA, a claim accrues when the plaintiff knows of his injury and its cause" and declining to "stretch the boundaries of the *Kubrick* decision to delay accrual of a federal tort claim until plaintiff knows or has reason to know of the culpability of federal agents") (citation omitted).

1105, 1110 (9th Cir.1999) ("It is true that many news articles were published regarding the experiments.... However, that doesn't mean that Bibeau must be lying about his ignorance, or that a reasonable man would necessarily have discovered the truth"); *In re Swine Flu*, 764 F.2d at 641 ("[Plaintiff] cannot be held accountable as a matter of law for press accounts in late 1976 or 1977"); *Orlikow*, 682 F.Supp. 77, 84-85 (D.D.C.1988) (statute of limitations does not begin to run with publication). To the contrary, plaintiff denies having seen virtually all of these publications before 1999. *See* Ritchie Dep. 170-71; Ritchie Dec. (April 30, 2002) ¶ ¶ 3 & 4.

Although plaintiff concedes reading one article detailing the government's experimentation with mind-control, *see* Ritchie Dep. at 22-23, 26, 197-210, 283-84 & Exh. B-12, he did not investigate the CIA's potential involvement in his injury. *Id.* at 283-84. This is not surprising. The article discusses limited experimentation with prostitutes. *Id.* Exh. B-12 ("CIA paid addict prostitutes $100 a day to lure customers and then lace their drinks with experimental drugs"). Although the article mentions the use of "experimental drugs," it does not mention LSD by name. Plaintiff need not extrapolate from an article about the administration of "experimental drugs" and "T-drugs" (marijuana) on prostitutes to his own experiences. Defendant demands too much.

The government also highlights congressional testimony and investigations about MKULTRA. *See* McGinn Dec. (Mar. 4, 2002) ¶ ¶ 8, 12-14, 18. The fact that these investigations occurred does not mean that plaintiff was aware of them. *See Bibeau*, 188 F.3d at 1111 (refusing to find that individuals "are aware of every report, white paper and floor statement delivered within the halls of the legislature."). Even if plaintiff *were* aware of these investigations, this knowledge would not necessarily put him on notice that he had been injured in 1957.

Plaintiff had apparently heard of LSD in the 1970s. Ritchie Dep. 278-81. He knew that LSD was a "mind-altering drug" that could cause a "bad trip" and "depression." *Id.* Defendant invites the court to find that plaintiff should have known he was given LSD in 1957 because he felt depressed and self-destructive at that time. Ritchie Dep. at 109-10, 124. The court declines this invitation. Self-destructiveness and depression are consistent with other injuries.

At oral argument, defendant repeatedly insisted that plaintiff should have "connected the dots," discovering the cause of his injury before 1997. The much touted "dots," however, were merely dim and distant stars in a cloudy sky. It would take an extraordinary knowledge of astronomy for a reasonable person to connect an article about drug experimentation on prostitutes, an awareness that LSD was an illegal drug that could cause a "bad trip," and a single reference to a federal employee working in San Francisco to conclude that he had committed a crime while under the influence of LSD in 1957. Even after connecting these dots, one is left with only a nebulous constellation. These points finally and only coalesced after plaintiff read Gottlieb's obituary in 1999, which explicitly stated that the CIA had given "mind-altering drugs to hundreds of unsuspecting Americans" in the 1950s. Ritchie Dep., Exh. C.

[8] Defendant has failed to prove as a matter of law that plaintiff knew or should have known his injury was caused by LSD before 1997. This remains a question of fact for the jury. *See Bibeau,* 188 F.3d at 1110 ("All of these factors and the inferences that can be drawn from them present questions of fact for a jury to resolve"); *cf. In re Swine Flu,* 764 F.2d at 641 (additional fact-finding necessary to determine if general community awareness obligated plaintiff to know the cause of his wife's death).

IV. *Laches*

Defendant contends that plaintiff's claims are barred by laches. To prevail, defendant must demonstrate that plaintiff "inexcusably delayed the pursuit of [his] claim," causing prejudice. *United States v. Marolf*, 173 F.3d 1213, 1218 (9th Cir.1999). For the reasons discussed above, defendant has failed to prove that plaintiff knew or should have known that his injury was caused by LSD before he read Dr. Gottlieb's obituary in March 1999. Absent this proof, the court cannot find plaintiff's delay "inexcusable." Defendant's motion is denied.

CONCLUSION

For the reasons stated above, the court DENIES defendant's motion in its entirety.

IT IS SO ORDERED.

210 F.Supp.2d 1120

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Filed July 12, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C00-03940 MHP

WAYNE A. RITCHIE,

Plaintiff,

v.

UNITED STATES OF AMERICA,ROBERT V. LASHBROOK, and IKE FELDMAN,

Defendants.

MEMORANDUM & ORDER

Plaintiff Wayne A. Ritchie commenced this action against the United States of America under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"), and against Robert V. Lashbrook and Ike Feldman under the First, Fourth, Fifth and Eighth Amendments to the United States Constitution. Plaintiff alleges that the Central Intelligence Agency and the Bureau of Narcotics tested psychoactive drugs on unknowing and unwitting American citizens including plaintiff during the 1950s. Plaintiff seeks twelve million dollars in compensatory damages as well as costs and attorneys' fees.

Defendants' motion to dismiss the complaint is now before the court. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

Plaintiff alleges that on December 20, 1957, he was a Deputy United States Marshal working in the United States District Court in San Francisco and attended a Christmas party in the Press Room of the United States Post Office Building.

Complaint ¶11. At the party, he consumed food and drinks, which he now believes were laced with LSD or another psychoactive drug. Complaint ¶ 12. He alleges that after the party, he became depressed and overcome with a sense of fear that his friends and acquaintances had turned against him. See Complaint ¶¶13, 14. He contends that he then went to three or four bars and had the "bizarre thought of robbing a bar. - Complaint ¶ 14. He returned to the Marshal's office and retrieved two service revolvers from his locker. Id. According to plaintiff, he then drove to another bar where he threatened the bartender with one of the firearms and demanded money. Complaint ¶15. Plaintiff was hit over the head and knocked unconscious.

He was taken into police custody, where he received medical treatment for his injury and wrote a letter of resignation to the United States Marshal. Complaint ¶¶15, 17.

Plaintiff alleges that, beginning in 1952 and continuing at least through 1960; the government developed a program called "MKULTRA" for the research and development of drugs to alter human behavior. Complaint ¶18, 26. He contends that it was a customary practice of the research project to spike with LSD the drinks of unwitting subjects in bars, other drinking establishments and safehouses in order to observe the effects of the drug in normal life settings. See Complaint ¶¶18-19. Plaintiff asserts that defendant Lashbrook and one Dr. Stanley Gottlieb were involved in planning the MKULTRA program. Complaint ¶ 22. Plaintiff alleges that in November 1953, defendant Lashbrook, under the supervision of Dr. Gottlieb, put LSD in a drink for unwitting Army civilian scientist Dr. Frank Olson. Complaint ¶20. According to plaintiff, the CIA subsequently found that the spiked drink caused Dr. Olson to commit suicide. Id.

Plaintiff alleges that he "first suspected that he might have been surreptitiously drugged" on March 15, 1999 when he read Dr. Gottlieb's obituary in the newspaper. Complaint ¶

23. He contends that he found additional support for his suspicion in April 1999 when he read a diary entry of George White, allegedly an agent of the Bureau of Narcotics and the operating head of the CIA's "mind-altering program" in San Francisco See Complaint ¶ 24. White's December 20, 1957 diary entry allegedly stated, "xmas party Fed bldg Press Room." Complaint ¶ 25. Plaintiff insists that the entry "supported his belief that he was indeed an unwitting victim of an LSD drugging or drugging with a like substance by agents of the CIA and/or the Bureau of Narcotics." Id. [1]

Plaintiff alleges that Lashbrook and/or defendant Ike Feldman and/or some other agent of the United States government caused LSD or some other hallucinogen to be administered to him without his consent as part of a program designed to test the effects of psychoactive drugs on unwitting persons. Complaint ¶¶ 26-27. Plaintiff contends that the administration of the drug caused him psychological damage, including severe mental distress, psychotic behavior and despondency, which persisted in variable degrees for many years. Complaint ¶ 29. In addition, he alleges that the administration of the drug caused him to lose his job as a deputy U.S. Marshal and deprived him of the opportunity to earn a livelihood in that position. Id..

Plaintiff filed a Notice of Claim with the Central Intelligence Agency ("CIA") and the Drug Enforcement Agency ("DEA") on October 22, 1999 as required by the FTCA; those claims were denied on April 26, 2000. He filed a complaint with this court on October 25, 2000. Defendants answered the complaint on March 2, 2001.[2]

On May 10, 2001, the United States and Ike Feldman moved to dismiss as time-barred plaintiff's Bivens claims and to dismiss for failure to state a claim plaintiffs' FTCA claims. Defendants amended their motion on May 24, 2001, seeking to join defendant Lashbrook to the motions.

LEGAL STANDARD

Defendants move to dismiss the complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Because defendants answered the complaint on March 2, 2001, their motion to dismiss is properly treated as a motion for judgment on the pleadings under Rule 12(c). See *Schwarzer, Tashima & Wagstaffe*, Cal. Prac Guide Fed Civ. Pro. Before Trial § 9:319 (The Rutter Group 2001); see also *City of Merced v. R.A. Fields*, 997 F. Supp. 1326, 1331 (E.D. Cal. 1998).

I. Rule 12(c)

Any party may move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. See Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. See *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir), cert. denied, 525 U.S. 981 (1998). If the court considers matters outside the pleadings, the motion for judgment on the pleadings is converted into a motion for summary judgment See *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1452, 1550 (9th Cir. 1990); *Schwarzer, Tashima & Wagstaffe* § 9:339.

II. Rule 56

Summary judgment shall be granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (citations omitted).

DISCUSSION

I. *Bivens* Claims

Plaintiff brings Bivens claims against Lashbrook and Feldman[3] alleging violation of his First, Fourth, Fifth and Eighth Amendment rights. Under Bivens v Six Unknown NamedAgents of the Fed Bureau of Narcotics, 403 U.S. 388 (1971), federal courts have inherent authority to award damages against federal officials to compensate plaintiffs for violations of their federal rights. See Bivens, 403 U.S. at 394.

Defendants argue that the Bivens claims must be dismissed because plaintiff failed to file suit within the statutory period. Californian's one-year statute of limitations for personal injury actions governs plaintiff's givens claims See *Western Center for Journalism v. Cederquist,* 235 F.3d 1153, 1156 (9th Cir. 2000). While the statute of limitations period is derived from state law, federal law determines when the statute of limitations accrues. See id. Under federal law, a Bivens claim accrues when plaintiff knows or had reason to know of the injury See id.

According to plaintiff, he first suspected that he might have been surreptitiously drugged with LSD when he read the obituary of Dr. Gottlieb on March 15, 1999. See Complaint ¶ 23. Plaintiff alleges that in April 1999, he discovered White's December 20, 1957diary entry, which "supported [plaintiff's] belief that he was indeed an unwitting victim of an LSD drugging or drugging with a like substance by agents of the CIA and/or Bureau of Narcotics " See Complaint ¶ 25. On the basis of these allegations, defendants argue that plaintiff's Bivens claims accrued by April 1999 at the latest. Plaintiff commenced this action on October 25, 2000.

Plaintiff contends that his Bivens claims were tolled while his administrative claim was pending before the CIA and the DEA. A plaintiff's pursuit of a remedy in another forum equitably tolls the limitations period if the plaintiff's actions (1) provide timely notice to defendants in filing the first claim, (2) do not prejudice defendants in gathering

evidence for the second claim and (3) demonstrate good faith and reasonable conduct in filing the second claim. See *Cervantes v. City. of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993). Ordinarily, equitable tolling is not properly resolved at the pleading stage See id. at 1276-77. The issue for decision at this stage of the proceedings is "whether the complaint, liberally construed in light of our 'notice pleading' system, adequately alleges facts showing the *potential* applicability of the equitable tolling doctrine." Id. at 1277 (emphasis in original).

Defendants argue that plaintiff's administrative FTCA claim does not satisfy the test for equitable tolling of the Bivens claims. First, defendants contend that the administrative FTCA claim did not provide notice to defendants of plaintiffs Bivens claims because plaintiff's Bivens and FTCA claims are separate and distinct. Defendants note that the elements of proof, the remedies available and the parties involved in a Bivens action are significantly different from those of an FTCA claim. Second, defendants argue that they are prejudiced by plaintiff having waited "not merely five additional months over the one year statute, but for more than 30 years from when `essential facts' were in the public domain." Defs.' Reply at 5.

The court has not found, and the parties do not cite, any case law holding that the statutory period for a Bivens action is properly tolled during the pendency of an administrative FTCA complaint.[4] In *Stone v. City an. County of San Francisco*, 735 F. Supp. 340 (N.D. Cal. 1990), this court held that plaintiff's administrative complaint under the California Tort Claims Act ("CTCA") was not sufficient to toll the statute of limitations on his federal civil rights action. See Stone, 735 F. Supp. at 343. The court followed the principles announced in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), in which the Supreme Court held that the timely filing of an administrative complaint with the EEOC did not toll the statute of limitations applicable

to an action under 42 U.S.C. § 1981 based on the same facts. See Stone, 735 F.3d 343-44 (citing Johnson, 421 U.S. at 460-61) ("the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent")). This court followed Johnson to conclude that the remedies and procedures under the CTCA and the Civil Rights Act are separate and independent. See Stone, 735 F. Supp. at 344.

Plaintiff insists that Stone is distinguishable. Plaintiff first notes that the court held in Stone that the administrative complaint filed with the San Francisco Police Department's Office of Citizen's Complaints did not qualify as a separate, formal legal action for the purposes of equitable tolling. See id. at 343. Plaintiff is correct; however, the court rejected the equitable tolling argument on the independent ground that the CTCA claim did not provide adequate notice to defendants of plaintiff's civil rights claim. See id. Plaintiff next argues that Stone is distinguishable with regard to notice because his Bivens and FTCA claims are neither separate nor distinct. Plaintiff reasons that "the Courts expect any attendant Bivens claim to be brought at the same time as the FTCA claim." Pl.'s Opp. at 17. The salient issue, however, is not what claims a court might expect but the claims for which defendants are on notice.[5]

Plaintiff's reliance on *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322 (9th Cir. 1987), is unpersuasive. In Salgado, the Ninth Circuit held that plaintiff's filing an administrative complaint with the Equal Employment Opportunity Commission tolled the running of the one year statute of limitations on plaintiff's age discrimination claim under the California Fair Employment and Housing Act ("FEHA"). See Salgado, 823 F.2d at 1325. The court declined to follow Johnson, noting that the procedures and remedies of Title VII and FEHA are "wholly integrated and related." Id. at 1326. In light of the overlapping nature and

similarity of purpose of federal and state employment discrimination statutes which, in fact, have a deferral scheme,[6] a feature not shared by plaintiff's FTCA and Bivens claims, Salgado does not assist plaintiff in this case. The FTCA and Bivens actions provide parallel remedies, but they do not constitute an integrated scheme. This case is therefore closer to Johnson and Stone than to Salgado.

Defendants have submitted to the court a copy of plaintiff's administrative FTCA claim. See Defs' Exh. E. In the claim, plaintiff recounts the events of December 20, 1957, his discovery of the Gottlieb obituary and his review of the White diary. Id. At Rider A. Plaintiff further asserts his belief that he was "a human guinea pig victim of a CIA program implemented ... to test experimental drugs on American citizens without their knowledge. Sidney Gottlieb, Robert Lashbrook, George White and Ike Feldman were involved in the planning and/or execution of this program, which was named MKULTRA." Id. Plaintiff's administrative claim alleges that these acts caused him "severe mental distress, caused psychotic behavior, caused [plaintiff] to lose [his] job and [his] ability to pursue [his] chosen occupation as a deputy United States marshal, and thereby deprived [him] of the ability to earn a livelihood in that position and/or obtain advancement." Id. at 2.

Plaintiff argues that the claim provided adequate notice because Lashbrook and Feldman were "specifically referenced" in the FTCA administrative claim. However, a claim under the FTCA is against the United States, and not against individual government agents. See 28 U.S.C. §§ 2674, 2679. There is no reason to believe that the individual defendants actually received the administrative complaint, and the fact that they were named in one paragraph of the complaint is not sufficient to provide them with notice that they may be individually subject to suit. Accordingly, the court will grant the motion to dismiss plaintiff's Bivens claims against defendants Lashbrook and Feldman.

II. FTCA

The United States moves to dismiss plaintiff's FTCA claims. The FTCA provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the. appropriate Federal agency within two years after such claim accrues." S 28 U.S.C. § 2401(b); see also *Bartleson v. United States*, 96 F.3d 1270, 1276 (9th Cir. 1996). As plaintiff filed his administrative claim with the CIA and the DEA on October 22, 1999, his FTCA claim against the government is untimely if it accrued prior to October 22, 1997.

The date on which an FTCA claim accrues is determined by federal law. See Bartleson, 96 F.3d at 1277. An FTCA claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its cause. See id. (citing *Landreth v. United States*, 850 F.2d 532, 533 (9th Cir. 1988), cert. denied, 488 U.S. 1042 (1989)). Accrual may be postponed where the government conceals the acts giving rise to the claim, or where plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted See *Kronisch v. United States*, 150 F.3d 112; 121 (2nd Cir. 1998). Under the diligence discovery rule, accrual is postponed only until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause See id.

In Kronisch, the executrix of the estate of Stanley Milton Glickman brought suit against the United States, Dr. Gottlieb and one Richard Helms, alleging that Gottlieb or some other agent of the United States government placed LSD in Glickman's drink without his knowledge in a Paris café in October 1952. See Kronisch, 150 F.3d at 116. The Second Circuit applied the diligence-discovery rule and postponed the accrual date of the FTCA claim until the plaintiff had or with reasonable diligence should have discovered the critical facts

of the injury and its cause. See id. at 121. The court agreed with the district court .that Glickman was aware of the basic facts of the claim when he was told by his sister about congressional hearings into the CIA's drug-testing of unwitting victims. See id. at 121-22.

The government argues that plaintiff cannot avail himself of the diligence-discovery rule because plaintiff was not diligent in investigating the facts of his claims between 1975 and March or April of 1999. The government refers the court to newspaper articles published in the 1970s revealing secret druggings by the CIA in the 1950s and 1960s. See Defs.' Notice of Filing.

Plaintiff alleges in his complaint that the government intentionally suppressed information about the drugging. Plaintiff asserts that no agent or employee of the government ever contacted him to identify him as a subject of the covert drug testing or to provide treatment to counteract the effects of the drugging. See Complaint ¶¶ 30-31. He alleges that the government "fraudulently concealed the facts" about the drugging and intentionally destroyed critical documents relating to the MKULTRA operation. See Complaint ¶ 35. He states that he first suspected that he might have been surreptitiously drugged with LSD when he saw Dr. Olson's obituary in a March 15, 1999 newspaper. See Complaint ¶ 23. He alleges that he found additional support for his belief in April 1999 when he discovered White's diary entry. See Complaint ¶ 25. In light of the allegations presented in the record developed to date, the court finds that plaintiff's FTCA claim accrued no earlier than March 1999 and is therefore not barred by the statute of limitations. The court will deny the motion to dismiss the FTCA claims against the United States as stated in the First and Second Causes of Action.

CONCLUSION

For the reasons stated above, the court GRANTS IN PART AND DENIES IN PART defendants' motion to dismiss

and DISMISSES plaintiff's claims as to defendants Lashbrook and Feldman (plaintiff's Fourth, Fifth, Sixth and Seventh Causes of Action).

IT IS SO ORDERED.

Dated July 12, 2001

s/s Marilyn Hall Patel
Chief Judge
United States District Court
Northern District of California

ENDNOTES

1. While all of this may sound like the plot of a "B" movie, it was, in fact, the plot of a movie with "A" stars, the movie being "Conspiracy Theory" starring Mel Gibson and Julia Roberts. Unfortunately, the plot existed in real life as the Rockefeller Commission and Church Committees discovered when they conducted extensive investigations into CIA human research activities including the MKULTRA program which was created during the cold war to explore advances in brainwashing techniques.

2. On June 6, 2001, defendants noticed their motion to amend the answer to correct a mistake regarding the identity of Dr. Gottlieb's successor as Chief of the Chemical Division of the Technical Services Division. The matter is presently set for hearing on July 16, 2001.

3. Plaintiff names as defendants Lashbrook and Feldman in their individual and official capacities and seeks only monetary damages. A Bivens action for monetary damages can be maintained against a defendant in his individual capacity only, and not in his official capacity. See *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988).

4. In *Kronisch v. United States*, 150 F.3d 112 (2nd Cir. 1998), the Second Circuit cited in a footnote the district court's observation that "[c]onceivably, plaintiff could argue that the limitations period for his Bivens claims should be tolled during the pendency of his administrative tort claim" See *Kronisch*, 150 F.3d at 123 n.7 (citing Kronisch III, 1997 WL 907994, at *15). The appellate court noted that the district court did not cite any authority for this proposition and concluded that the district court had "no occasion to decide whether the limitations period should be tolled during the pendency of the administrative claim."

5. At the hearing on defendants motion, plaintiff relied on *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994), to argue that he had no choice but to bring his FTCA and Bivens

claims together. In Gasho, the Ninth Circuit held that under section 2676 of the FTCA, any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment. See Gasho, 39 F.3d at 1437; so also Ting v. United States, 927 F.2d 1504, 1513 n.10 ("judgment against the government [on an FTCA claim] will completely bar any subsequent [Bivens] action against the individual officers"). Gasho does not assist plaintiff here. Although plaintiff could not have brought a Bivens action after the issuance of judgment on an FTCA claim, there is no reason why plaintiff could not have instituted his Bivens action while his FTCA administrative claim was pending. See Gasho, 39 F.3d at 1438 (acknowledging that plaintiffs "may pursue both [FTCA and Bivens] remedies in separate actions [but] they may secure judgments on both claims only if the Bivens judgment is entered first."); see also *Ting*, 927 F.2d at 1513 n.10 ("judgment against individual federal officers in a Bivens action does not preclude a later action against the United States under the FTCA").

6. See 42 U.S.C. §2000e-5(e).

CAPTION

AMENDED JOINT PRE-TRIAL STATEMENT

The parties submit the following amended joint pre-trial statement, pursuant to this Court's order at the November 8, 2004 case management conference and Fed. R. Civ. Proc. 26(a)(3):

1. THE ACTION

A. Substance of the Action.

Plaintiff Wayne Ritchie filed this action under the Federal Tort Claims Act to recover for injuries allegedly sustained on December 20, 1957. Ritchie alleges that on that day, he was unwittingly administered lysergic acid diethylamide ("LSD") by a private individual or an agent of the United States government at the direction of agents of the Central Intelligence Agency ("CIA") and/or the Federal Bureau of Narcotics ("FBN"). Ritchie contends that he was the victim of a CIA program known as "MKULTRA," which involved - - among other things - - the administration of LSD to unwitting people during the 1950's and early 1960's. At the time, Ritchie was a deputy Unitd States Marshal at the San Francisco federal courthouse in the Post Office Building. Ritchie also sued two former federal employees, Ira Feldman and Robert Lashbrook, in their individual capacities for violations of his constitutional rights. The Court dismissed the constitutional claims in 2001 on statute of limitations grounds.

The complaint seeks damages under the FTCA for negligent supervision, invasion of privacy, and intentional infliction of emotional distress. The following disputed issues remain to be decided at trial:

1. Whether Wayne Ritchie was an LSD victim of the CIA's or FBN's drugging program:
2. Whether Ritchie's alleged drugging with LSD was the cause of his psychotic episode?

3. If the answer to the above questions is affirmative, what are the non-economic damages suffered by Ritchie?

The parties have stipulated that the amount of economic damages that Ritchie suffered for past and future loss of earnings and retirement is $1,276,959, if the Court finds liability at trial.

B. Relief Prayed.

In addition to the economic damages described above, Ritchie claims $10,723,041 in non-economic damages.

II. FACTUAL BASIS FOR THE ACTION.

A. Undisputed Facts.

The parties submit the following facts that are not reasonably disputable, and stipulate that they may be incorporated into the trial record without the necessity of supporting testimony or exhibits.

1. Plaintiff Wayne A. Ritchie was born on June 15, 1927. On December 20, 1957, plaintiff then 30 years old was a Deputy United States Marshal in the Northern District of California, located in the federal courthouse in the Post Office Building in San Francisco.

2. On December 20, 1957, Ritchie lived at the Ellis Street apartment with Dorothy McGinn, his girlfriend and eventual wife. By that December 20, Ritchie and McGinn had known each other and lived together for six months. McGinn was unemployed, and had recently moved to San Francisco from New York City.

3. December 20, 1957 was a Friday. Ritchie reported to work at the Marshal's Office on the second floor of the federal building at 8:30 in the morning, after stopping by Foster's coffee shop for a cup of coffee. Ritchie remembers Jim Eagan, a deputy U.S. Marshal in charge of the criminal department, being at work, along with Joe Maher, Bill Hannan, Charlie McCarthy, and Jim

Comerford, who were deputy U.S. Marshals in the criminal department like Ritchie.

4. Sometime around noon on December 20, 1957, plaintiff Ritchie attended a Christmas party at the Press Room in the Pot Office Building for about a half hour, ate a sandwich, and drank a bourbon and soda, made with a shot of bourbon and ice cubes. Deposition of Plaintiff Wayne A. Ritchie, taken July 17-18, 2001, at 149, 150-52-33. Plaintiff only drank bourbon and soda at the time. Id. at 149, 150-52, 33. Plaintiff returned to the Christmas party again later in the afternoon at about 2:00 p.m. for about an hour or possibly a little more, and had three or four more drinks. Id. at 244, 33, 102-03, 105,108.

5. At noon on December 20, 1957, Eagan allowed the other deputy U.S. Marshals in the criminal department to leave work early, so they could go Christmas shopping for their families. Ritchie stayed at work because he was the only deputy in his office, without a local family. Egan told Ritchie at noon that he could go to the federal building Christmas party to get some lunch.

6. The Christmas party, which was thrown by some attorneys who practiced in the federal courts, was in the press room on the third floor of the federal building. When Ritchie arrived at the party at noon, there were very few people there: just a few newspaper reporters and one or two court personnel.

7. Ritchie remembers one of the press rooms containing one long table with food for sandwiches and snacks like potato chips. In an adjacent room, there was a long table that was a self-service bar containing hard liquors, wines, mixers, and ice.

8. Ritchie returned to his office at 12:30, and worked until about 2:00 p.m. At 2:00 p.m., Jim Eagan returned to the office from a lunch engagement and told Ritchie he could go back to the Christmas party and have a few drinks if he wanted to. Ritchie returned to the party, and stayed

for about an hour. He did not eat, but he drank three or four bourbon and sodas.

9. During both trips to the Christmas party, Ritchie does not recall seeing George White, Ira Feldman, Jim Eagan, or anyone else from the Federal Bureau of Narcotics or the Marshal's Service. There were 30 to 50 people at the Christmas party.

10. Ritchie left the Christmas party at about 3:00 p.m. and returned to his office. Ritchie stayed at the office, alone, until 4:30 p.m., when he locked up the office and left.

11. Ritchie walked home from work. McGinn was at the apartment when Ritchie arrived, and she made negative comparisons between San Francisco and New York.

12. Ritchie knew McGinn had an ex-boyfriend in New York.

13. Ritchie left his apartment - - alone - - five minutes after arriving there, and walked to the Vagabond Bar, where he had two bourbon and sodas. Ritchie stayed at the Vagabond Bar for 20 to 35 minutes, then walked towards the courthouse, stopping at three more bars along the way.

14. While visiting the bars on December 20, 1957, Ritchie had decided that he would retrieve his weapons from his locker at work, hold up a bar, and use the money to buy McGinn an airline ticket back to New York City. Ritchie did not have enough money in his checking account to buy McGinn a ticket. Ritchie also thought that robbing the bar would be an act of self-destruction.

15. Ritchie retrieved both of his service revolvers from his locker at work, and took them to his car, which was parked at the courthouse. He drove directly to the Fillmore District looking to rob a bar without coming into contact with any of his law enforcement friends.

16. Ritchie parked his car in the Fillmore District, and walked into the nearest bar. There were no customers in

the bar, so Ritchie left. He heard some people talking and laughing in a bar down the street, so he walked there.

17. Ritchie walked into the Shady Grove Bar. He sat down and ordered a drink. When Ritchie finished his drink, he walked to a serving station at the end of the bar and showed the bartender his .38 caliber revolver. Ritchie asked for some money, and the bartender placed some bills on the counter. Ritchie told the bartender to get some more money. At that point, a waitress asked Ritchie what he was doing, and when he turned around, someone knocked him unconscious. When ~~Ritchie came~~ to, the police had arrived and handcuffed him.

18. Plaintiff suffered a brief psychotic episode on the night of December 20, 1957 that resulted in his attempted robbery of the Shady Grove bar.

19. While in jail, plaintiff resigned from his position as a Deputy United States Marshal. *Id.* at 353.

20. On February 19, 1958, plaintiff pled guilty to attempted robbery with a deadly weapon. *Id.* Exhibit I. On March 12, 1958, the state court suspended the sentence and imposed a $500,000 fine and placed plaintiff on probation for five years during which he was directed to "abstain totally from alcoholic beverage." *Id.*

21. Several subprojects funded under MKULTRA involved the administration of LSD to unwitting persons. These subprojects were established under the auspices of George H. White, a Federal Bureau of Narcotics official.

22. Subproject 42, which was established in February, 1955 when George White moved from New York City to San Francisco, involved the administration of drugs to unwitting people in the San Francisco area. George White supervised Ira Feldman in the San Francisco office of the Federal Bureau of Narcotics from 1955 to early 1963.

* * *

D. Disputed Fact Issues

1. Whether Wayne Ritchie was an LSD victim of the CIA's or FBN's drugging program?

2. Whether Ritchie's alleged drugging with LSD was the cause of his psychotic episode.

3. If the answer to the above questions is affirmative, what are the non-economic damages suffered by Ritchie.

* * *

F. Stipulations.

* * *

2. The parties stipulate that if the Court finds liability, then Ritchie's economic damages, past and future, total $1,276,959, as calculated by plaintiff's economist, Peter Formuzis.

1. PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO THE INHERENT POWER OF THE COURT

PLEASE TAKE NOTICE that on November 15, 2004 at 2:00 p.m., or as soon thereafter as he may be heard, plaintiff Wayne A. Ritchie will request the Court, Honorable Marilyn Hall Patel, in Courtroom 15 on the 18th Floor at 450 Golden Gate Avenue, San Francisco, California, pursuant to its inherent power to grant plaintiff's motion for sanctions against the defendant United States of America. The evidence in plaintiff's favor is clear and convincing:

(i) that defendant's attorneys practiced a deliberate "fraud on the court," has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice by threatening to interfere with the rightful decision of this case through (a) Feldman's perjury, (b) Feldman's lies suborned by defendant's attorneys, (c) submission of Feldman's false testimony knowing it was false in support of defendant's amended summary judgment motion, (d) intentional interference with, and obstruction of, Feldman's second deposition, . . . (f) intentional false representations to this Court, (g) preparation and submission to this Court of Feldman's Declaration on March 2, 2002 that was deliberately designed to deceive this Court and (h) misconduct by defendant's attorneys that effectively subverted the federal judicial system contrary to the duty of loyalty and honesty owed to this Court by defendant's attorneys;

(ii) that defendant's attorneys compounded the wrong done to plaintiff by willfully engaging in a scheme to deny plaintiff due process of law and deny him his day in court through the misconduct set forth under subparagraph

(i) above which was planned and executed by lawyers from the United States Department of Justice (AUSA), the CIA and DEA which misconduct was deliberately, willfully, and intentionally flatly inconsistent with the requirements of a civilized judicial system that are firmly embedded in the law of our country. Therefore, we respectfully request this Court to exercise its discretion by striking defendant United States of America's answer and awarding plaintiff a partial final judgment on liability on the merits against the defendant and ordering a hearing on the damages issue. The Declaration of Sidney Bender, with Exhibits, is filed in support of this motion ("Bender Dec.").

CAPTION

REFILED DECLARATION OF SIDNEY BENDER IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS

I, SIDNEY BENDER, declare as follows:

1. I am a member of Leventritt Lewittes & Bender, attorneys for plaintiff, and appear in this action *Pro Hac Vice,* and am fully familiar with the factual and procedural history of this case. I submit this declaration in support of plaintiff's motion for sanctions pursuant to the inherent power of the court.

2. The following exhibits are attached:

Exhibit	**Description**
1.	Spin Magazine article
2.	Transcript of videotape of Feldman interview on Mind Control Murder (1999)
3.	Excerpts from Feldman's first deposition on July 30, 2002; Cover, 284-285, 288, 295-298
4.	Excerpts from Feldman's second deposition on February 7, 2003; cover, 346-347, 360-361, 367, 428-435
5.	Excerpts from Feldman's second deposition on February 7, 2003; cover 471-472, 474, 477-478
7	San Jose Mercury News dated December 22, 1957
8.	Feldman's Declaration filed on March 2, 2002, executed on August 1, 2001

9.	Transcript of Stratton 1994 videotape of some of Feldman's interview ("Acid Test")
10.	Excerpts from Gittinger's first deposition on August 2, 2002; cover, 99-100, 107, 109-110
11.	Excerpts from John Mark's book *The CIA and Mind Control The Search For The Manchurian Candidate;* cover, 94-95, 98-99
12	Excerpt from the Church Report; cover 391

I declare that, under penalty of perjury, the foregoing exhibits are true copies. Executed in New York, New York on this 13th day of October 2004.

/S/

Sidney Bender

ALTERED STATES OF AMERICA

By Richard Stratton
Spin Magazine, March 1994

x x x

> "I was a very minor missionary, actually a heretic, but I toiled wholeheartedly in the vineyards because it was fun, fun, fun. Where else could a red-blooded American boy lie, kill, cheat, steal, rape, and pillage with the sanction and blessing of the All-Highest?"

-George Hunter White

The meeting was set for noon at a suitably anonymous bastion of corporate America, a sprawling Marriott Hotel and convention center on Long Island. Driving out of the city, I was tense and paranoid.

x x x

Ira "Ike" Feldman is the only person still alive who worked directly under the legendary George Hunter White in MK-ULTRA.

x x x

I recognized Feldman immediately when he waddled into the lobby of the Marriott. I had heard he was short, five three, and I'd read how George White used to dress him in a pinstriped zoot suit, blue suede shoes, a Bursalino hat with a turned-up brim, and a phony diamond ring, then send him onto the streets of San Francisco to pose as an East Coast heroin dealer. Now in his '70's, Feldman still looks and talks like Edward G. Robinson playing gangster Johnny Rocco in *Key Largo.*

x x x

"What's this about?" Feldman demanded. "Who the fuck are you?"

I explained I was a writer researching George White. White, a world-class drinker known to polish off a bottle of gin at a sitting and get up and walk away, died of liver disease in 1975, two years before MK-ULTRA was first made public.

"Why do you want to write about White? I suppose it's this LSD shit."
No, I said, not just the LSD, George White deserved to have his story told.

"White was a son of a bitch." Feldman said. "But he was a great cop . . ."

"The LSD," Feldman began, "that was just the tip of the iceberg. Write this down. Espionage. Assassinations. Dirty tricks. Drug experiments. Sexual encounters and the study of prostitutes for clandestine use. That's what I was doing when I worked for George White and the CIA."

For my next Interview with Feldman, I rented a day room at the Marriott and brought along a tape recorder. Feldman totteredin, pulled a small footballshaped clear plastic ampule out of his pocket and pluncked it on the table. It was filled with pure Sandoz LSD-25. He also showed me a gun disguised as a fountain pen which could shoot a cartridge of nerve gas. "Some of the stuff George White and I tested," he explained.

Ike Feldman remembers that time well. A Brooklyn boy, he was drafted into the Army in 1941. Army tests showed he had an unusual facility for language, so he was enrolled in a special school in Germany where he learned fluent Russian. By the end of the war, Feldman was a lieutenant colonel with a background in Military Intelligence. The

Army sent him to another language school, this time in Monterey, California, where he added Mandarin Chinese to his repertoire.

While with Military Intelligence in Europe, Feldman first heard of George White. "White was with the OSS [Office of Strategic Services, forerunner of the CIA]. I heard stories about him. Donovan [William, "Wild Bill" Donovan, founder of the OSS] loved White. . . ."

x x x

In the early '50's, after a stint in Korea working for the CIA under Army auspices, Feldman decided he'd had enough of military life. He settled in California.

x x x

"Before long, I got a call – this time from White," Feldman continued. "We understand you're back in the States," he says. "I want you to come in to the Bureau of Narcotics." This was '54 to '55, White was District Supervisor [of the Federal Bureau of Narcotics] in San Francisco. I went in. I go to room 144 of the Federal Building, and this is the first time I met George White. He was a big, powerful man with a completely bald head. Not tall, but big. Fat. He shaved his head and had the most beautiful blue eyes you've ever seen." "Ike," he says, "we want you as an agent. We know you've been a hell of an agent with Intelligence. The CIA knows it. You speak all these languages. We want you to work as an under cover agent in San Francisco.."

What Feldman didn't know at the time was that George White was still working for the CIA. White's particular area of expertise was the testing of drugs on unwitting human guinea pigs. During the war, one of White's projects for the OSS was the quest for a "truth drug," a serum that could be administered to prisoners of war or captured spies during interrogations. After trying and

rejecting several substances the OSS scientists settled on a highly concentrated liquid extract of cannabis.indica, a particularly potent strain of marijuana. Never one to shrink from the call of duty, White first tried the drug on himself. He downed a full vial of the clear, viscous liquid and soon passed out without revealing any secrets.

Meanwhile, at the CIA's Technical Services Staff (TSS), the department specializing in unconventional weaponry such as poisons, biological warfare, psychoactive substances, and mind control, Dr. Sidney Gottlieb was searching for a candidate to head MK-ULTRA. Gottlieb, a club-footed scientist who overcame a pronounced stutter in his rise to head the TSS, had discovered White's name while perusing old OSS files on the Truth Drug Experiments. White's credentials were impeccable: A former crime reporter on the West Coast before he joined the narcotics bureau, White had soon become one of the top international undercover agents under Harry Anslinger, the grandfather of America's war on drugs.

Moonlighting for the CIA, with funds he disbursed by Gottlieb, White rented two adjoining apartment safe houses at 81 Bedford Street in Greenwich Village. Using the alias Morgan Hall, he constructed an elaborate alter-identity as a seaman and artist in the Jack London mode. By night, CIA spy Morgan Hall metamorphosed into a drug-eating denizen of the bohemian coffeehouse scene. With a head full of acid and gin, White prowled downtown clubs and bars. He struck up conversations with strangers, then lured them back to the pad where he served drinks spiked with Sandoz's finest.

"Gloria gets the horrors . . . Janet sky high," White dutifully recorded in his diary. In another entry, he proudly noted, "Lashbrook at 81 Bedford Street – Owen Winkle

and the LSD surprise – can wash." In recognition of the often bizarre behavior brought on by the drug, White assigned LSD the codename "Stormy."

According to an agency memo, the CIA feared KGB agents might employ psychedelics "to produce anxiety or terror in medically unsophisticated subjects unable to distinguish drug-induced psychosis from actual insanity." In an effort to school "enlightened operatives" for that eventuality, Dulles and Gottlieb instructed high-ranking agency personnel, including Gottlieb's entire staff at TSS, to take LSD themselves and administer it to their collegues.

"There was an extensive amount o self-experimentation for the reason that we felt that a firsthand knowledge of the subjective effects of these drugs [was] important to those of us who were involved in the program," Gottlieb explained at a Senate Subcommittee hearing years later.

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But as covert LSD experiments proliferated, things down at CIA headquarters began to get out of hand. "LSD favors the prepared mind," wrote Dr. Oscar Janiger, a Los Angeles psychiatrist and early LSD devotee. Non-drug factors such as set and setting – a person's mental state going into the experience and the surroundings in which the drug is taken – can make all the difference in reactions to a dose of LSD.

Frank Olson was a civilian biochemist working for the Army Chemical Corps' Special Operations Divisions (SOD) at Fort Detrick in Frederick, Maryland. . . .

xxx

Olson's specialty at Fort Detrick was delivering deadly diseases in sprays and aerosol emulsions.

Just before Thanksgiving in 1953, at a CIA retreat for a conference on biological warfare, Gottlieb slipped Olson a

huge dose of LSD in an after-dinner liqueur. When Gottlieb revealed to the uproarious group that he'd laced the Cointreau, Olson suffered a psychotic snap. "You're all a bunch of thespians!" Olson shouted at his fellow acid trippers, then spent a long night wandering around babbling to himself.

Back at Fort Detrick, Olson lapsed in and out of depression, began to have grave misgivings about his work, and believed the agency was out to get him. Ten days later, he crashed through the tenth-floor window of the Statler Hotel in New York and plummeted to his death on the sidewalk below.

x x x

"White had been testing the stuff in New York when that guy Olson went out the window and died," Feldman said. "I don't know if he jumped or he was pushed. They say he jumped. . . ."

x x x

Unfazed by the suicide of their colleague, the CIA's acid enthusiasts were, in fact, more convinced of the value of their experiments. They would now focus on LSD as a potent new agent for offensive unconventional warfare. The drug-testing program resumed in the Bay Area under the cryptonym Operation Mid-night Climax. It was then that White hired Feldman.

Posing as Joe Capone, junk dealer and pimp, Feldman infiltrated the seamy North Beach criminal demimonde. "I always wanted top be a gangster," Feldman told me. "So I was good at it. Before long, I had half a dozen girls working for me. One day, White calls me into his office. 'Ike' he says, 'you've been doing one hell of a job as an undercover man. Now I'm gonna give you another assignment. We want you to test these mind-bending drugs.' I said, 'Why the hell do you want to test mind-

bending drugs?' He said, 'Have you ever heard of *The Manchurian Candidate*? I know about *The Manchurian Candidate*. In fact, I read the book, 'Well,' White said, 'that's why we have to test these drugs, to find out if they can be used to brainwash people.' He says, 'If we can find out just how good this stuff works, you'll be doing a great deal for your country.'"

These days, Feldman takes offense at how his work has been characterized by former cops who knew him. "I was no pimp," Feldman insisted. Yet he freely admitted that his role in Midnight Climax was to supply whores. "these cunts all thought I was a racketeer," Feldman explained. He paid girls $50 to $100 a night to lure johns to a safe house apartment that White had set up on Telegraph Hill with funds provided by the CIA. Unsuspecting clients were served cocktails laced with powerful doses of LSD and other concoctions the CIA sent out to be tested.

"As George White once told me, 'Ike, your best information outside comes from the whores and the junkies. If you treat a whore nice, she'll treat you nice. If you treat a junkie nice, he'll treat you nice.' But sometimes, when people had information, there was only one way you could get it. If it was a girl, you put her tits in a drawer and slammed the drawer. If it was a guy, you took his cock and you hit it with a hammer. And they would talk to you. Now, with these drugs, you could get information without having to abuse people."

The "pad," as White called the CIA safe house, resembled a playboy's lair, circa 1955. . . .

x x x

White outfitted the place with elaborate bugging equipment, including four microphones disguised as electrical outlets that were connected to tape recorders

hidden behind a false wall. While Feldman's hookers served mind-altering cocktails and frolicked with the johns, White sat on a portable toilet behind the two-way mirror, sipping martinis, watching the experiments, and scribbling notes for his reports to the CIA.

x x x

"White always wanted to try everything himself," Feldman remembered. "Whatever drugs they sent out, it didn't matter, he wanted to see how they worked on him before he tried them on anyone else. He always said he never felt a goddamn thing. He thought it was all bullshit. . . ..

"This thing" – Feldman held up the fountain pen gas gun – "the boys in Washington sent if out and told us to test the gas. White says to me, 'C'mon, Ike. Let's go outside. I'll shoot you with it, then you shoot me." "Fuck that, " I said. "You ain't gonna shoot me with that crap." So we went outside and I shot George White with the gas. He coughed, his face turned red, his eyes started watering. He was choking. Turned out, that stuff was the prototype for Mace."

I asked Feldman if he'd ever met Sidney Gottlieb, the elusive scientist who was the brains behind MK-ULTRA. "Several times, Sidney Gottlieb came out," Feldman assured me. "I met Gottlieb at the pad, and at White's office. White used to send me to the airport to pick up Sidney and this other wacko, John Gittinger, the psychologist, Sidney was a nice guy. He was a fuckin' nut. They were all nuts. I says, "You're a good Jewish boy from Brooklyn, like me. What are you doing with these crazy cocksuckers? He had this black bag with him. He ways, "This is my bag of dirty tricks." He had all kinds of crap in that bag. We took a drive over to Muir Woods out by Stinson Beach. Sidney says, "Stop the car." He pulls out a dart gun and shoots this big eucalyptus tree with a

dart. Then he tells me, Come back in two days and check this tree." So we go back in two days, the tree was completely dead. Not a leaf on it. Now that was the forerunner of Agent Orange.

"I went back and I saw White, and he says to me, "What do you think of Sidney?" I said, "I think he's a fuckin' nut." White says, "Well he may be a nut, but this is the program. This is what we do." White thought they were all assholes. He said, "These guys are running our Intelligence?" but they sent George $2,000 a month for the pad, and as long as they paid the bills, we went along with the program." Gottlieb, who now lives in Virginia, refused to be interviewed for this article.

"Another time, I come back to the pad and the whole joint is littered with these pipe cleaners, " Feldman went on. "Who's smokin' a pipe? Gittinger, one of those CIA nuts, was there with two of my girls. He had 'em explaining all these different sex acts, the different positions they know for humping. Now he has them making these little figurines out of the pipe cleansers-men and women screwing in all these different positions. He was taking pictures of the figurines and writing a history of each one. These pipe cleaner histories were sent back to Washington."

A stated goal of Project MK-ULTRA was to determine "if an individual can be trained to perform an act of attempted assassination involuntarily" while under the influence of various mind-control techniques, and then have no memory of the event later. Feldman told me that in the early '60's, after the MK-ULTRA program had been around for over a decade, he was summoned to George White's office. White and CIA director Allen Dulles were there.

"They wanted George to arrange to hit Fidel Castro," Feldman said. "They were gonna soak his cigars with LSD and drive him crazy. George called me in because I had this whore, on of my whores was this Cuban girl and we were gonna send her down to see Castro with a box of LSD-soaked cigars."

x x x

The public first learned on MK-ULTRA in 1977, with the disclosure of thousands of classified documents and CIA testimony before a Senate Subcommittee on Health and Scientific Research chaired by Senator Edward Kennedy. Ike Feldman was subpoenaed and appeared on a panel of witnesses, but the senators failed to ask him a single question. Sidney Gottlieb, complaining of a heart condition, testified at a special semi-public session. He delivered a prepared statement and admitted to having destroyed perhaps one set of files. Another set was turned over to Senate investigators. The full extent of the CIA's activities under the rubric of MK-ULTRA may never be known.

George White retired from the Narcotics Bureau in 1965. The last ten years of his life, he lived in Stinson Beach, California, where, known as Colonel White, he went on the wagon for a few years and became chief of the volunteer fire department.

x x x

After White's death, his widow donated his papers, including diaries, to an electronic surveillance museum. As information on MK-ULTRA entered the public domain, people who had known White only in his official FBN capacity were stunned to learn of his undercover role as Morgan Hall.

Ike Feldman, kept alive by a pacemaker, lives with his wife in a quiet suburban Long Island community where he tends

his garden and oversees a number of business interests. According to George Belk, a former head of the Drug Enforcement Agency in New York, Feldman quit the drug agency following a probe by the internal security division. "Feldman was the sort of guy who didn't have too many scruples," said Dan Casey, a retired FBN agent who worked with Feldman in San Francisco. "for him, the ends justified the means." A DEA flack confirmed Feldman "resigned under a cloud" at a time when a number of agents came under suspicion for a variety of offenses, none having to do with secret drug-testing programs.

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"To make a long story short," he said using one of his favorite verbal segues, "I want the truth of this to be known so that people understand that what we did was good for the country."

x x x

As we walked on, I asked Feldman to explain how his work had been helpful to the country.

"I learned that most of this stuff was necessary for the United States," he said, "and even though it may have hurt somebody in the beginning, in the long run it was important. As long as it did good for the country."

x x x

IKE FELDMAN EXCERPTS FROM A&E's MIND CONTROL MURDER

At 1 minute, 17 seconds:
It didn't matter who they were, if they were American citizens or not. If they screwed up or they lied or they knew something they shouldn't, they were killed.

At 14 minutes, 46 seconds to 15 minutes, 16 seconds:
George White, as far as I was concerned, was a fine gentleman. He was a big fat, little man, about 250 lbs. He was mean and nasty, but he liked animals, he liked birds, he was good to people and I admired him a lot.

* * *

At 16 minutes, 14 seconds to 16 minutes, 30 seconds:
The CIA was very interested in trying to find some kind of a mind bending material . . .that they could use for a truth serum which they thought was LSD.

At 18 minutes, 58 seconds to 19 minutes, 14 seconds:
We tested these drugs in bars, in restaurants, in so-called massage parlors, any place there was a drink and people were eating and drinking, that's where the stuff was tested.

At 36 minutes, 48 seconds to 36 minutes, 59 seconds:
As far as assassination was concerned, it was convenient and necessary if people knew too much or they were going to the wrong place to talk too much.

IRA FELDMAN'S DEPOSITION
ON FEBRUARY 7, 2003

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Q. Now, all these people that **you personally drugged**, you never did any follow-up on them, in the sense of telling them **that you had drugged them**, did you?

* * *

A. Not all the people that **I drugged.** I drugged guys involved in about ten, twelve, period. I didn't do any follow-up, period, because it wasn't a very good thing to go and say "How do you feel today?". You don't give them a tip. You just back away and let them worry, like this nitwit, Ritchie.

Q. When you say "let them worry", you mean let them have a head full of LSD…

A. Let them have a full head [of LSD] like what happened, like what happened with this nut [Ritchie] when he got out and got drunk.

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Q. And did you understand the extent of the suffering that these people, these ten or twelve people, that you had given LSD to – the extent of the suffering that they would encounter as a result of being administered the LSD by you?

A. I did not, because none of them were suffering.

* * *

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4-30

Q. Well, if people saw snakes coming out of the wall, do you think they were suffering?

A. If people saw snakes coming out of the wall and that stopped another Pearl Harbor from getting Americans killed, it was worth it. They could suffer their brains out. That's the way I feel about it. If it was doing good with the country, the hell with the people with the snakes. I love this country, period. I got medals to prove it. I'm a good citizen, and I piss on these guys that are suffering. They would suffer so much so we wouldn't have trouble like we have today. Now, what more do you want to know?

* * *

Q. (continuing) When you gave them LSD, you decided that the person that you chose would suffer?

* * *

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A. No. I didn't decide.

Q. Who decided it?

A. Nobody.

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Q. Who decided to give that particular person that you gave LSD to LSD? That was you?

A. Sidney Gottlieb. He said, "Get that guy. Get this guy. Ray, get this guy."

I didn't pick out anybody. I don't know what the hell he wanted these people for.

Q. So that every time that you gave somebody LSD, Sidney Gottlieb was along?

A. No, he wasn't along. But he most likely knew these people. He said, "Hey, Joe, the guy in the bar, give him some LSD." And he didn't say "LSD." He said, "Give them a dose. Give them a belt. Give them something. And let George know what's happening. "George" was White. When it was done, and I got a report, I wrote it up and gave it to White, and I have no idea what White did with that report.

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Q. So each and every time that you gave somebody LSD you were following orders to give that particular person LSD?

A. Absolutely. I didn't pick out anybody. I didn't pick out a soul.

Q. So you just followed the order of either Gottlieb, Treichler or White?

A. Right.

Q. And that's what you did?

A. That's what I did.

Q. And whoever they chose, that's the person you gave it to?

A. That's the way it was done.

* * *

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Q. ... But that's all you did was follow orders, is that right?

A. No. I didn't follow orders all the time.

Q. Did you ever say "I'm not going to give LSD to that person"?

A. I didn't say that. I said "Not this guy, not her," period. I was very, very choosey, period.

Q. So you negotiated with --

A. I negotiated. I more or less moved the chips a little bit.

Q. And in talking to Gottlieb, "Not this person. How about this person"?

A. Possibly. Possibly. Possibly.

Q. And you negotiated with Ray Treichler: "Maybe not this person. Let's do it to this person"?

A. Possibly. Possibly.

Q. So you have a distinct recollection of doing that negotiation?

A. Oh, absolutely I have a recollection.

4435

Q. And you negotiated with White and you said "Maybe not this guy. Let's do it to this guy"?

A. Same thing, right. Absolutely.

Q. So you were in on the decision process.

A. Of course I was in on the decision process.

Q. So you were essentially deciding who was going to suffer and who was not going to suffer.

A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy [Ritchie], who saw snakes coming out, he deserved to suffer. He [Ritchie] had eight

or ten drinks and then goes out and gets a couple of guns and tries to hold up someone, And then he waits - -

SAN JOSE MERCURY NEWS
SAN JOSE, CALIFORNIA SUNDAY MORNING,
DEC 22 1957
Officer
Held As
Robber
Suspect Beaten
In Holdup Try
SAN FRANCISCO – A deputy U.S. marshal Saturday faced a charge of armed robbery for trying to hold up a San Francisco tavern to get money for his girlfriend.

The suspect, Wayne A. Ritchie,

DEPUTY MARSHAL ARRESTED – Wayne A Ritchie, 30, a deputy U.S. marshal, sits in San Francisco City Jail Saturday, where he was booked on suspicion of robbery after he attempted holdup of a tavern.

X X X

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CAPTION

DECLARATION OF IRA C. FELDMAN

I, Ira C. Feldman, declare as follows:

1. I am aware that plaintiff in this case originally named me as a defendant but that the action against me has been dismissed. My date of birth is December 10, 1918. A couple of years ago I had open heart surgery and, as a result, I find any travel extremely difficult.

2. From 1955 through 1968, I was a Special Agent for the Federal Bureau of Narcotics in San Francisco, California. Our office was located in the Federal Building which I believe was on Golden Gate Avenue. Several other agencies were also located in the Federal Building, including the Federal Bureau of Investigation.

3. Based on the Complaint that plaintiff Wayne A. Ritchie filed, I understand that plaintiff alleges that he attended a Christmas party in the United States Post Office Building at Seventh and Mission on December 20, 1957 and alleges that he believes some unidentified person may have drugged his food or drink.

4. I do not recognize plaintiff's name. I do not recall knowing anyone by the name of Wayne A. Ritchie. Although the Courts, the Office of the United States Attorney and the United States Marshal were located at the United States Post Office Building at Seventh and Mission, I worked in a different building. I never attended any Christmas parties which were held in the United States Post Office Building. I have no knowledge about anyone allegedly being drugged at a Christmas party on December 20, 1957. I have no reason to believe that anyone associated with the Federal Bureau of Narcotics drugged anyone at a Christmas party anytime.

****

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of August, 2001, in Uniondale, New York.
Dated: July 30, 2001

/s/
Ira C. Feldman

IRA FELDMAN – ACID TEST

At 1 minute, 4 seconds:
I don't think it was a better enforcement and CIA agent in the world than George White. He was always drunk, but he always straightened himself up.

At 1 minute, 30 seconds:
We were very much interested in mind-altering drugs, dirty tricks, assassinations...

At 2 minutes, 7 seconds:
When people had information there was only one way to get it, if it was a girl, you put her tits in the drawer and you closed the drawer, and if it was a guy you took his cock and you hit it with a hammer, then they would talk to ya.

At 2 minutes, 30 seconds:
I would go to various bars, various massage parlors, and these cunt all thought that I was a racketeer. I says, honey I want you to do a favor for me, and I says, I want you to pick up Joe Blow, take him to the apartment and give him a blow job. And while he's there I want you to ask him, heh, you know that airplane? How high did it fly?

At 3 minutes, 47 seconds:
I would give these drugs to certain people. Most of the times the LSD drug had a very, very bad effect. It would make people sick, it would make people believe that there were snakes coming through the wall, it would make people believe that the ground was going to open up. It made people act like jackasses.

At 4 minutes, 41 seconds:
I must state that George White tried every one of these things that came from Washington. He didn't believe me telling him what happened to this girl or this guy, he wanted to try it himself.

CAPTION

VIDEOTAPED DEPOSITION OF JOHN W. GITTINGER TAKEN ON BEHALF OF THE PLAINTIFF ON AUGUST 2, 2002 IN NORMAN, OKLAHOMA **Page 99**

You observed David Rhodes actually putting LSD into an entertainer's drink in San Francisco; isn't that right?

A. I did not.

Q. You did not observe that?

A. I did not.

Q. And if he testified to that, would you say that he was creating a fiction, sir?

A. Yes, I certainly would.

Q. And is it your testimony, sir, that you never attended a club during the day with Mr. Rhodes at which he placed LSD into the entertainer's drink without her knowledge?

A. I did not.

Q. And if he testified, sir, that you were his superior and that you brought the LSD in a vial to him out in San Francisco, you would say he would be telling an untruth: is that it?

A. That is right.

Q. So it's a question of whether you're telling the truth or whether he's telling the truth?

A. I assume so, yes.

Q. And he testified, just for - - that he - - when he was out there, he had - - he and Mr. Pasternak had called on this entertainer for at least eight days in which he socialized with her at the club that she was performing - -

xxx **Page 100**

Q. (By Mr. Bender) And he socialized with her for eight days before he actually slipped LSD into her drink

Now, my question to you is, did he ever tell you that he intended to slip LSD into her drink?

A. I expect he did, yes.

Q. And when did he tell you that?

A. I think that probably was in the initial plan.

xxx **Page 107**

Q. Did anybody, under your direction, visit the club after the drug was administered to the entertainer?

xxx

THE WITNESS: There wasn't anybody there from the CIA except Rhodes and Pasternak.

Q. (By Mr. Bender) And Feldman from the Narcotics Bureau?

A. Yes. xxx

Q. (by Mr. Bender) . . .

Did you subsequently have a meeting with Rhodes, Pasternak and Feldman at which the operation was discussed?

Not with Feldan - - Feldman.

xxx **Page 109**

Q. (By Mr. Bender) Who did Rhodes tell you about whether she was hospitalized or not?

A. I was told that the establishment called an ambulance and that she was taken by ambulance to Kaiser Memorial Hospital. And later on Ike Feldman checked up and found out that she was doing all right. And that's the last I knew of it.

xxx **Page 110**

Q. . . . Did Ike Feldman tell you that he checked up on her or did he tell David Rhodes?

A. As I remember, he did.

Q. He told you?

A. Yes.

Q. Did you learn subsequently that the entertainer's name was Ruth Kelly?

A. Yes.

McGraw-Hill Paperbacks

THE CIA AND MIND CONTROL

THE SEARCH FOR THE MANCHURIAN CANDIDATE

"Explosive . . . A hell of a book"
- Studs Terkel

JOHN MARKS
Co-author of the CIA and the Cult of Intelligence

INTELLIGENCE OR "WITCHES POTIONS"

The San Francisco safehouse specialized in prostitutes. "But this was before *The Hite Report* and before any hooker had written a book," recalls a TSS man, "so first we had to go out and learn about their world. In the beginning, we didn't know what a john was or what a pimp did." Sid Gottlieb decided to send his top staff psychologist, John Gittinger, to San Francisco to probe the demimonde.

George White supplied the prostitutes for the study, although White, in turn, delegated much of the pimping function to one of his assistants, Ira "Ike" Feldman. A muscular but very short man, whom even the 5'7" White towered over, Feldman tried even harder than his boss to act tough. Dressed in suede shoes, a suit with flared trousers, a hat with a turned-up brim, and a huge zircon ring that was supposed to look like a diamond, Feldman first came to San Francisco on an undercover assignment posing as an East Coast mobster looking to make a big heroin buy. Using a drug-addicted prostitute named Janet Jones, whose common-law husband states that Feldman paid her off with heroin, the undercover man lured a number of suspected drug dealers to the "pad" and helped White make arrests.

As the chief Federal narcotics agent in San Francisco, White was in a position to reward or punish a prostitute. He set up a system whereby he and Feldman provided Gittinger with all the hookers the psychologist wanted. White paid off the women with a fixed number of "chits." For each chit, White owed one favor. "So the next time the girl was arrested with a john," says an MKULTRA veteran, "she would give the cop George White's phone number. The police all knew What and cooperated with him without asking questions. They would release the girl if he said so. White would keep good records of how many

chits each person had and how many she used. No money was exchanged, but five chits were worth $500 to $1,000." Prostitutes were not the only beneficiaries of White's largess. The narcotics agent worked out a similar system to forgive the transgressions of small time drug pushers when the MKULTRA men wanted to talk to them about "the rules of their game," according to the source.

TSS officials wanted to find out everything they could about how to apply sex to spying, and the prostitute project became a general learning and then training ground for CIA carnal operations. After all, states one TSS official, "We did quite a study of prostitutes and their behavior . . . At first nobody really knew how to use them. How do you train them? How do you work them? How do you take a woman who is willing to use her body to get money out of a guy to get things which are much more important, like state secrets. I don't care how beautiful she is – educating the ordinary prostitute up to that level is not a simple task."

The TSS men continually tried to refine their knowledge. They realized that prostitutes often wheedled extra money out of a customer by suggesting some additional service as male orgasm neared. They wondered if this might not also be a good time to seek sensitive information. "But no," says the source, "we found the guy was focused solely on hormonal needs. He was not thinking of his career or anything else at that point." The TSS experts discovered that the postsexual, light-up-a-cigarette period was much better suited to their ulterior motives.

"If we were scared enough of a drug not to try it out on ourselves, we sent it to San Francisco," recalls a TSS source. According to a 1963 report by CIA Inspector General John Earman, "In a number of instances, however, the test subject has become ill for hours or days, including hospitalization in at least once case, and (White) could only follow up by guarded inquiry after the test subject's return to normal life. Possible sickness and attendant economic loss are inherent contingent effects of the testing."

The Inspector General noted that the whole program could be compromised if an outside doctor made a "correct diagnosis of an illness." Thus, the MKULTRA tam not only made some people sick but had a vested interest in keeping doctors from finding out what was really wrong. If that bothered the Inspector General, he did not report his qualms, but he did say he feared "serious damage to the Agency" in the event of public exposure. The Inspector General was only somewhat reassured by the fact that Goerge White "maintain[ed] close working relations with local police authorities which could be utilized to protect the activity in critical situations."

If TSS officials had been willing to stick with their original target group of marginal underworld types, they would have had little to fear from the police. After all, George White *was* the police. But increasingly they used the safehouse to test drugs, in the Inspector General's words, "on individuals of all social levels, high and low, native American and foreign." After all, they were looking for an operational payoff, and they knew people reacted differently to LSD according to everything from health and mood to personality structure. If TSS officials wanted to slip LSD to foreign leaders, as they contemplated doing to Fidel Castro, they would try to spring an unwitting dose on somebody as similar as possible. They used the safehouse

for "dry run[illegible] the intermediate stage between the laboratory and actual operations.

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For these dress rehearsals, George White and his staff procurer, Ike Feldman enticed men to the apartment with prostitutes. An unsuspecting john would think he had bought a night of pleasure, go back to a strange apartment, and wind up zonked. A CIA document that survived Sid Gottlieb's shredding recorded this process. Its author, Gottlieb himself, could not break a lifelong habit of using nondescriptive language. For the MKULTRA chief, the whores were "certain individuals who covertly administer this material to other people in accordance with [White's] instructions." White normally paid the women $100 in Agency funds for their night's work, and Gottlieb's prose reached new bureaucratic heights as he explained why the prostitutes did not sign for the money: "Due to the highly unorthodox nature of these activities and the considerable risk incurred by these individuals, it is impossible to require that they provide a receipt for these payments or that they indicate the precise manner in which the funds were spent." The CIA's auditors had to settle for canceled checks which White cashed himself and marked either "Stormy" or, just as appropriately, "Undercover Agent." The program was also referred to as "Operation Midnight Climax."

TSS officials found the San Francisco safehouse so successful that they opened a branch office, also under George White's auspices, across the Golden Gate on the beach in Marin County. Unlike the downtown apartment, where an MKULTRA man says "you could bring people in for quickies after lunch," the suburban Marin County outlet proved useful for experiments that required relative isolation.

FOREIGN AND MILITARY INTELLIGENCE

FINAL REPORT

OF THE

SELECT COMMITTEE

TO STUDY GOVERNMENTAL OPERATIONS

WITH RESPECT TO

INTELLIGENCE ACTIVITIES

UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL SUPPLEMENTAL AND SEPARATE VIEWS

April 26, 1976

LSD was one of the materials tested in the MKULTRA program. The final phase of LSD testing involved surreptitious administration to unwitting nonvolunteer subjects in normal life settings by undercover officers of the Bureau of Narcotics acting for the CIA.

The rationale for such testing was "that testing of materials under accepted scientific procedures fails to disclose the full pattern of reactions and attributions that may occur in operational situations."

According to the CIA, the advantage of the relationship with the Bureau was that

> Test subjects could be sought and cultivated within the setting of narcotics control. Some subjects have been informers or members of suspect criminal elements from whom the [Bureau of Narcotics] has obtained results of operational value through the tests. *On the other hand, the effectiveness of the substances on individuals at all social levels, high and low, native American and foreign, is of great significance and testing has been performed on a variety of individuals within these categories* [Emphasis added.]

TRIAL

TRIAL – APRIL 8, 2005

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THE COURT: Do you want to go to the second part of your argument?

MR. MARTIKAN: I do. It's separate from Daubert. Obviously, there are 2 issues in this case, but for purposes of the standard before the court now, we will - - the constraints would admit that a reasonable juror could find, as Your Honor found in the summary judgment order, that Feldman, Feldman's statements in his deposition could have been an admission.

So, purely on the issue of causation, there's an interesting lack of evidence and an interesting logical hole, I guess, is the best way to put it in Dr. Ketchum's opinion.

* * *

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THE COURT: Did you intend to make a motion?

MR. MARTIKAN: Well, I'm sorry. I just argued, but that was - -

THE COURT: That was, your motion?

MR. MARTIKAN: That was the motion, Your Honor.

THE COURT: Well, do you want to state it fully for the record exactly what the motion is?

MR. MARTIKAN: Yes. Thank you for that opportunity. Your Honor, this is a motion that - - what has just been argued is defendant's motion for judgment as a matter of law on 2 issues:

The lack of causation issue, because of the lack of any evidence on which any reasonable juror could find causation in this case and, also, on the Daubert issue, this court's legal - - the standard under Daubert under which this court is a gatekeeper, as a matter of law, for the reliability of expert testimony.

So on those 2 issues, we move for judgment as a matter of law, Your Honor.

THE FOLLOWING PETITIONER'S EXHIBITS AND DEPOSITION EXCERPTS WERE INTRODUCED AT TRIAL AND SOME OTHERS HAVE BEEN REPRODUCED AS PART OF THE SUPPORT FOR PETITIONER'S MOTION FOR SANCTIONS, supra.

Sunday, December 22, 1957
San Francisco Chronicle

Good Guy Fails As Bad Guy

By Hale Champion

WAYNE RITCHIE
The slowest gun alive

You would have to call it an adult Western.

There were, after all, a two-gun U.S. marshal, a waitress lady friend with a roving eye and a bunch of the boys whooping it up in the Shady Grove saloon.

It is the drama of a good guy who went bad because a dame done him wrong.

Wayne A. Ritchie, 30, of 710 Ellis Street, is a U.S. deputy marshal, an ex-Marine, a onetime Alcatraz guard, a wiry, balding fellow with a firm chin.

About five months ago, he got a final divorce from his wife and soon thereafter met a cocktail waitress who, if he had had his way, would be nameless.

She was, he reported yesterday morning, small, slender, brown-haired, green-eyed and 32. He loved her dearly and looked forward to formalizing their living arrangements in February.

But he was a little disturbed as he went about his work Friday – picking up and delivering assorted bad men,

PLAINTIFF'S EXH. 2

two bank robbers and a confidence man, to and from courts and jails.

She had been talking long distance to a man in New York City, the city from which she came to the West four months ago, and Ritchie was upset. A Federal Office Building Christmas party and four or five bourbons with soda helped, however, and went back to the apartment after work feeling pretty good.

She was waiting for him, calmly flipping the pancakes she knew he loved.

Between adroit flips, she told him.

"I'm going back to New York," she said (Flip.) "If I get the money in time, I'll take the plane Sunday." (Flip.)

"Are you going back to the other guy?" (Flip.)

"I'm just going back to New York." (Flip.)

Exit Deputy Marshal Ritchie.

From bar to bar he went, drowning his sorrows, caring not.

"Although he didn't remember the incident yesterday, he apparently met his green-eyed flame again about 8:30 p.m. in an O'Farrell street bar.

She (Dorothy McGuin, also of 710 Ellis Street and without employment, she told police) had another heated discussion with him, then took her turn in walking out.

As he sat there, he had an inspiration.

He'd show her what kind of man he was. He'd bandage his wounded ego. He'd get the money for her trip to New York – the kind of magnificent gesture that befitted a gentleman of the old Tenderloin West.

In short, he would stage a holdup.

He went back to the U.S. marshal's office and picked up two snub-nosed .38 special revolvers, tucking them into the top of his trousers, one on each hip. Then he began to cruise the city in his car.

The deputy marshal ended up at the Shady Grove Saloon, 1340 Steiner Street.

It was about 10 p.m. and Ritchie knew what had to be done.

He swaggered in and up to bartender Malvin Stone, 33, of 1810 Bush Street, then drew the gun on his right hip.

"This is a holdup." he said.

"Open up this register or I'll blow your brains out."

Stone did, coming up with 14 $1 bills.

Ritchie spotted another cash register at the other end of the bar.

"Go up there and get everything out of that and hand it .....

But the deputy's gun sagged, and Stone was on him in a trice.

The bartender knocked the gun to the floor and other patrons joined in the ensuing melee.

When Patrolman Raymond Skow arrived, he found the battered marshal, lump on his head and blood on his shirt, lying on the men's room floor. A number of men were sitting on him.

Skow also found the second revolver tucked in his pants causing some after-thought panic among those who had been resting comfortably on the deputy for the last few minutes.

Ritchie was carrying his deputy marshal's credentials so police put in a call to the U.S. Marshal's office before locking him away, explaining that one of the marshal's men was on the wrong side of the law.

The response was laughter and the banging of a phone receiver on a hook.

So police booked their fellow law enforcement officer into the city prison on suspicion of armed robbery.

A professional bondsman posted $2,500 bail and Ritchie went home.

The deputy was contrite and puzzled yesterday morning.

"I just can't account for it. I wouldn't have believed it", he said.

SAN JOSE MERCURY NEWS Obituaries
THURSDAY MARCH 11, 1999

S. Gottlieb, directed mind-control tests

New York Times

WASHINGTON – Sidney Gottlieb, who presided over the CIA's Cold War efforts to control the human mind and provided the agency poisons to kill Fidel Castro, died Sunday in Washington, Va.

He was 80, and had spent his later years caring for dying patients, trying to run a commune, folk-dancing, consciousness-raising and fighting lawsuits from survivors of his secret tests.

Friends and enemies alike say Mr. Gottlieb was a kind of genius, striving to explore the frontiers of the human mind for his country while searching for religious and spiritual meaning in his life. But he will always be remembered as the government chemist who dosed Americans with psychedelics in the name of national security, the man who brought LSD to the CIA.

In the 1950's and early '60's the agency gave mind altering drugs to hundreds of unsuspecting Americans in an effort to explore the possibilities of controlling human consciousness.

In all, the agency conducted 149 separate mind-control experiments, and as many as 25 involved unwitting subjects. First-hand testimony, fragmentary government documents and court records show that at least one participant died, others went mad and still others suffered psychological damage after participating in the project, known as MKULTRA. The experiments were useless. Mr. Gottlieb concluded in 1972, shortly before he retired.

PLAINTIFF'S EXH. 6

The CIA awarded Mr. Gottlieb the Distinguished Intelligence Medal and deliberately destroyed most of the MKULTRA records in 1973.

Mr. Gottlieb was also involved in the CIA's assassination plots. In the Eisenhower and Kennedy administrations, Mr. Gottlieb, always under orders from the director of central intelligence, developed a poisonous handkerchief to kill an Iraqi colonel, an array of toxic gifts to be delivered to Fidel Castro, and a poison dart to kill a leftist leader in the Congo. None of the plans succeeded.

After he left the CIA, Mr. Gottlieb and his wife went to India, where he ran a leper hospital for 18 months. A lifelong stutterer, he pursued a master's degree in speech therapy.

He is survived by his wife and four children . Penny Gottlieb Cheluk, Rachel Gottlieb Samoff, Peter Gottlieb and Steven Gottlieb. Cleaving to old habits of secrecy, his wife declined to disclose the cause of Mr. Gottlieb's death.

Friday, December 20, 1957

354th Day—11 days to follow

APR-30-01 11:04
APR 30 '01 02:57PM

Lunch Glen —
x-mas party Ind Bldg.
Press Room

PLAINTIFF'S EXH. 8

P.02
R-281
Job-017
P.2

IRA FELDMAN – ACID TEST

At 1 minute, 4 seconds:
I don't think it was a better enforcement and CIA agent in the world than George White. He was always drunk, but he always straightened himself up.

At 1 minute, 30 seconds:
We were very much interested in mind-altering drugs, dirty tricks, assassinations...

At 2 minutes, 7 seconds:
When people had information there was only one way to get it, if it was a girl, you put her tits in the drawer and you closed the drawer, and if it was a guy you took his cock and you hit it with a hammer, then they would talk to ya.

At 2 minutes, 30 seconds:
I would go to various bars, various massage parlors, and these cunt all thought that I was a racketeer. I says, honey I want you to do a favor for me, and I says, I want you to pick up Joe Blow, take him to the apartment and give him a blow job. And while he's there I want you to ask him, heh, you know that airplane? How high did it fly?

At 3 minutes, 47 seconds:
I would give these drugs to certain people. Most of the times the LSD drug had a very, very bad effect. It would make people sick, it would make people believe that there were snakes coming through the wall, it would make people believe that the ground was going to open up. It made people act like jackasses.

At 4 minutes, 41 seconds:
I must state that George White tried every one of these things that came from Washington. He didn't believe me telling him what happened to this girl or this guy, he wanted to try it himself.

PLAINTIFF'S EXHIBIT 22

IKE FELDMAN EXCERPTS FROM
A&E's MIND CONTROL MURDER

At 1 minute, 17 seconds:
It didn't matter who they were, if they were American citizens or not. If they screwed up or they lied or they knew something they shouldn't, they were killed.

At 14 minutes, 46 seconds to 15 minutes, 16 seconds:
George White, as far as I was concerned, was a fine gentleman. He was a big fat, little man, about 250 lbs. He was mean and nasty, but he liked animals, he liked birds, he was good to people and I admired him a lot.

* * *

At 16 minutes, 14 seconds to 16 minutes, 30 seconds:
The CIA was very interested in trying to find some kind of a mind bending material . . .that they could use for a truth serum which they thought was LSD.

At 18 minutes, 58 seconds to 19 minutes, 14 seconds:
We tested these drugs in bars, in restaurants, in so-called massage parlors, any place there was a drink and people were eating and drinking, that's where the stuff was tested.

At 36 minutes, 48 seconds to 36 minutes, 59 seconds:
As far as assassination was concerned, it was convenient and necessary if people knew too much or they were going to the wrong place to talk too much.

PLAINTIFF'S EXH 24

3 February 1953

GOTTLIEB, Dr. Sidney: Conference With

2. Dr. Gottlieb explained the very advanced work that is being done with Lysergic Acid (LSD) by OTS and its support groups.

3. Dr. Gottlieb stated the results to date were very encouraging, so much so that they did not wish to call to attention any Agency interests concerning Lysergic Acid and, hence, plan to use this and hence; plan to use the nonsense name "_____" rather than make reference to LSD or Lysergic Acid. Dr. Gottlieb indicated that in many ways, LSD, because of the infinitely small amounts necessary to produce a narcotic effect, is regarded as a very interesting and potentially effective agent for our use if it could be properly developed. Dr. Gottlieb pointed out that, LSD is quite capable of producing very strong mental derangement when used in amounts so small as to be unseeable and incapable of being tasted or smelled.

PLAINTIFF'S EXH. 28

PSYCHIATRIC EVALUATION

Report of Psychiatric Examination of Wayne A. Ritchie
1824 Glen Una Avenue, San Jose, CA 95125
DOB: 15 June 1927
Interview Conducted on 20 April 2001 by James S. Ketchum, M.D.
In Tehachapi, California at the request of
Sidney Bender, Esq., New York City
Report Written and Typed by James S. Ketchum, M.D., A.B.P.N.
Assistant Clinical Professor of Psychiatry, UCLA
21560 Sunnyslope Street
Tehachapi, California 93561
Completed and Submitted To Sidney Bender, Esq.
Of Leventritt Lewittes & Bender, New York on 5 December 2001

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PLAINTIFF'S EXH. 34

REPORT OF PSYCHIATRIC EVALUATION

A. INTRODUCTION

On Saturday, 21 April 2001, at the request of Mr. Sidney Bender, I performed a four- hour psychiatric interview of Mr. Wayne Ritchie in my home-office in Tehachapi, California. This interview was supplemented by two additional phone calls of approximately 30 minutes and 90 minutes respectively in June and September during which I sought clarification and supplementation of some of the history. In addition I reviewed his deposition testimony on July 17 and 18, 2001. The following narrative summarizes my evaluation and conclusions.

B. HISTORY OF THE ALLEGED PERSONAL INJURY

Mr. Ritchie's primary complaint is that he was covertly given a dose of LSD or - some related psychedelic drug, on the afternoon of 20 December 1957. As a result, he claims that he developed paranoid delusions of rejection, peculiarities of perception, severe agitation, and disturbed judgment. During this altered state, he attempted to carry out the armed robbery of a bar and was arrested. Within eight hours of the initial symptoms, he became aware of the seriousness of what he had done, resigned his position as Marshal, became suicidal and expressed a wish for punishment. He could not understand the cause of his uncharacteristic behavior, and assumed he was morally lacking in some way. Subsequently he remained severely depressed for at least six years, and experienced disturbing flashbacks and nightmares. His self-esteem was destroyed, and his life style changed from that of an outgoing, cheerful and ambitious Marshal to that of a guilt ridden, self-depriving, subdued house painter, with recurrent suicidal urges.

* * * * *

The sequence of events began on Friday, 20 Dec 57 when Deputy Marshal Wayne Ritchie attended an annual Christmas party in the pressroom of the building where lie worked in San Francisco. While other Marshals were allowed to go home early, Wayne agreed to remain on duty to help his boss Jim Eagan cover the Criminal Division office.

At noon, Jim told Wayne to go to the party and come back in about an hour so he could go out himself. After consuming a sandwich and a single bourbon and soda, Wayne returned as instructed and Jim left for lunch elsewhere. Following Jim's return, he suggested Wayne revisit the party, have a couple more drinks if he wanted, and then come back again to cover the office for the rest of the day_

At about 2:00 P.M., Wayne returned to the pressroom party for approximately an hour or a little more, and slowly consumed approximately three or four more bourbons with soda and ice. He cannot recall who was present during that second visit. Returning to the Marshal's office about 3:15 P.M., he replaced Jim Eagan at the desk, ready to receive prisoners brought in to be booked, or other duties as needed. Eagan left almost immediately, and Wayne remained alone in the office until 4:30 P.M.

Within a short time, Wayne noticed himself starting to think strangely and feeling uneasy. He began to imagine that his fellow officers were laughing at him as he sat alone on duty while they were home relaxing. Gradually he became convinced that not only they, but everyone else, even the people across the hall, had turned against him and wanted him out of the way. Rather than angry, he felt hurt and greatly disappointed that all his previously congenial coworkers and friends would suddenly turn against him. As his agitation mounted, he finally felt unable to remain in the office, and locked up half an hour early, at 4;30 P.M. He had never before left the office without coverage before quitting time. Instead of driving home, as he

invariably had done previously, he walked to his apartment, feeling an urgent need to relax.

As he walked; Wayne noticed that his movements seemed to require no effort, as though he were gliding- along the sidewalk. Also, although there were numerous Christmas shoppers on the street, he paid-no-attention to them, feeling at times that he was walking in a tunnel. One of his girlfriend Dorothy's first remarks after he entered the apartment, was a jesting comment about her preference for New York over San Francisco. Although she had frequently made similar half-serious remarks in the past, Wayne interpreted this comment as another sign that no one wanted him. He left without further conversation, feeling even more discouraged.

He went to the nearby Vagabond Bar operated by his good friend Tony, who served him a drink, but Wayne soon became convinced that Tony too was against him. Leaving abruptly, he decided to return to the office. Along the way, he stopped at three unfamiliar bars, ordering a non-alcoholic drink (i.e..; Calso) at each, trying meanwhile to formulate a plan. His feelings of discomfort, paranoia and agitation continued. Moving from one bar to the next, he kept trying to analyze the situation. Suddenly lie decided that since everyone was against him, he would "help them out." Believing that Dorothy. wanted to go to New York, he decided to hold up a bar, get enough money to pay for her plane ticket, after which he felt sure he would be arrested and eliminated from the Marshals. As his plan formed he decided to hold off on further alcohol, partly because he was short of money but also because be was trying to concentrate and wanted to stay sober.

Returning to the office, he retrieved two revolvers from his personal locker, placing one in a hip holster and the other in his topcoat. This also was unique -- he had never before armed himself with two guns. After locking up, he walked to his car and drove three miles to the Fillmore District, a rough neighborhood where he believed he would not be recognized.

He parked and entered a bar but it was relatively empty and he thought it unlikely to have much cash. Hearing noisy activity coming from a second bar, he went inside and ordered a drink. When he finished it, he walked up to the bartender, showed his revolver, and demanded money.

The bartender put some dollar bills on the bar. Wayne said they were not enough and demanded more. A waitress distracted him by asking what he was doing, and someone hit him over the head. The next thing he knew he was on the floor of a supply room with two police officers standing over him asking what he was doing in there with a gun. His first response was "One gun? I have two guns," and he indicated the second one in his hip holster. Although he was bleeding from a scalp wound, he was unaware of it and felt no pain.

Handcuffed and taken to a clinic to have his wound sutured, he was thereafter put in a lock-up cell at the local precinct. Addressing one of the policemen, he implored him: "As one officer to another, just give me a gun with one bullet in it and I can save the State a-whole lot of money:"[v] He made this earnest request without success. As he describes it, "the whole thing then just overwhelmed me as I realized what I had done. I had become a traitor and betrayed the whole Service, all my friends and everyone who knew me, all in one foul (sic) swoop.'.' He remembers breaking down and "crying like a baby."

Not long after being moved from jail to the city prison, Wayne wrote a letter of resignation, asking it be delivered to the office of the Marshal. He spoke at some length to a nearby reporter, although he had been thoroughly trained not to discuss official matters with the media. His explanation is that he felt confused about his "berserk" behavior, and was hoping such a conversation might help him to figure it out. Later, he was quoted in a news article as saying "I hope I get what I deserve."

Wayne stayed awake all night in a state of agitation and remorse. The next morning he was bailed out. Two days later, the whole incident was duly reported on the front page of a

major San Francisco paper, including further details of how he was allegedly disarmed and pistol-whipped by the bartender. Another paper contained the headline: "Good Guy Fails as Bad Guy," with a picture captioned "The Slowest Gun Alive." Both articles were derisive and suggested, in effect, that truth was often stranger (and more incredible) then fiction. Everyone, including Wayne, assumed that alcohol must be to blame, even though he had never before reacted to alcohol with notably inappropriate behavior. The amount consumed, furthermore, was much less than he was accustomed to drinking at social gatherings. He states he had often consumed much more than a dozen drinks without doing anything unseemly.

He sequestered himself in his apartment with Dorothy and tried to avoid talking to anyone. The only one allowed in was an officer who came to collect some items belonging to the Marshal's Office. He told Wayne he would "never work for the Government again." Almost no one else tried to contact him except for his old friend and supervisor from Alcatraz days, Frank Johnson.

A few days after the event, someone else called from the Marshal's office. advising him to meet with an attorney who would take his case for a reasonable fee. Upon Wayne's arrival at the attorney's office, he was met by his parents. His father's first words were "We would all have been better off if you had been killed in the War." This greatly deepened his despair and reinforced his determination to end his life. Although unwilling to discuss it, Wayne was now convinced he was a terrible person, "lower than pond scum, and unworthy of being a member of the human race." This was a sudden change from what was previously a positive self-image.

As he was entering the courthouse in March, Pierre, a lawyer with whom he was acquainted, passed him in the hallway and muttered the single word "stupid!" Wayne wanted to enter a guilty plea, but his attorney had persuaded him not to do so. A plea bargain was negotiated with the prosecutor to have

the charge reduced from actual to attempted armed robbery. When the judge asked Wayne how he wanted to plead, he said "on the advice of my attorney, I plead not guilty." Actually he hoped to be sent to prison, where he believed he would soon be done away with by inmates. He knew that prisoners often welcomed the chance to kill a "dirty cop" and thus gain tacit favor with prison officials. The judge initially sentenced him to two years in prison but then, to Wayne's -disappointment, suspended the prison sentence, placed him on probation, fined him $500 and told him not to drink for five years. Wayne paid off the fine in installments as lie could afford, and although it was not an easy thing to do, completely abstained from alcohol for the full five years.

As soon as his parole officer permitted, Wayne moved to San Jose to be near his brother and sister-in-law. Dorothy did not join him immediately-. He sought work as a painter to support himself Too ashamed to approach a prospective employer and "look him in the eye," he found a 90-day job through the newspapers. When asked at the Union office why he had given up such a good job as US Marshal, he gave what would become his standard reply: "I got drunk and tried to hold up a bar." This generally fended off further questions. His next job was with Pyramid Painters, where he worked for more than nine years, followed by various painting jobs and some self-employment until his retirement at age 65.

Soon after arriving in San Jose, Wayne had been baptized at the urging of his landlord, who had noticed Wayne's obvious depression and urged him to come to his church and be baptized. He underwent baptism by immersion which seemed to help a little but did not take away his obsession with suicide. He continued to feel that sooner or later hie was morally obligated to take his own life.

Dorothy subsequently joined him in San Jose. She "got down on her knees" begging him to take her back and promising never to drink again. They subsequently married in

1958, after which she revealed she had a five year-old daughter, "little Dot," living with relatives in Rhode Island. Wayne persuaded them to send the girl to San Jose and he adopted her. The new family stayed together for three "bumpy" years.

One night, after she had returned from drinking at a nightclub, a policeman came to the door to ask her about a mink stole her drinking companions had reported missing. She denied knowing anything about it but later proudly showed it off to Wayne. He insisted that she return it immediately. She complied and then disappeared, leaving Wayne alone with "little Dot." Eighteen months went by before she contacted them by phone and visited for less than a day. Six months later a police officer in San Francisco called Wayne to tell him that Dorothy had been arrested for trying to kill her boyfriend and herself. Unable to locate her, Wayne divorced her by giving notice by publication, ending their four-year marriage.

After Dorothy's disappearance, Wayne and seven year-old Dot moved into a small house. This made room for his parents, whose presence he needed to help look after his daughter while he worked. He continued to paint, sometimes paying his father to help him, and keeping little for himself. Although they worked amicably together, he believes his father never forgave him for his wrongdoing. They did not discuss the subject.

For at least the first six years following his conviction, while trying to maintain an outwardly calm appearance, Wayne was tormented by the recurrent fantasy of slashing his carotid artery, one of three methods of causing quick death he had learned from inmates at Alcatraz. Obsessive thoughts about it would intrude several times a week, usually while shaving but "something always got in the way." Most often it was a sense of commitment to his church, daughter, and parents that held him back.

Flashbacks of the attempted holdup recurred frequently while he was painting, or even when shopping in a supermarket.

He had many nightmares. When painting on high ladders he was especially cautious not to fall, lest his death be considered accidental and fail to leave a message of remorse. He wrote down (and still keeps) a list of friends and colleagues to whom he particularly wanted to apologize, planning to send final notes to each when the time seemed right to carry out his suicide.

From 1962 to 1967, a period of five years or more, Wayne did not date or socialize, feeling unworthy of acceptance either by potential male friends or women companions. After his divorce from Dorothy, Wayne and his parents joined another church where he soon became actively involved, even though secretly he did not feel worthy of being a legitimate member. He avoided forming intimate relationships and talked to no one about his deep feeling of guilt, believing that someone might "somehow reach inside and touch it."

Serving the church became the primary focus of his efforts. For many years he served as chief usher and arranged candlelight services at Christmas. He contributed his skills as painter, working for little beyond the cost of the materials. He often voluntarily painted the church interior and also generally took care of its maintenance as a trustee.

After years of celibacy and avoidance of social contacts Wayne eventually agreed, with persistent urging from his mother, to attend a church group of individuals who had been "previously married." There he met Virginia, a widow twelve years his senior, who had four grown children. Her deceased alcoholic husband had committed suicide, a seeming coincidence that helped to create a spiritual bond between them. In 1968, he married her.

Before scheduling his marriage to Virginia, Wayne had finally confided his true past to her and to his teenage daughter. Virginia accepted this confession with equanimity and assured him it was not necessary when he offered to tell the rest of her family. Together he and Virginia devoted tireless efforts to a number of charitable programs: They visited people

in crisis situations, cooked and delivered food to the homeless, and spent at least four hours twice a month answering a hot-line sponsored by the local chapter of "Contact" (an international outreach program.)

In 1993, he and Virginia were chosen from more than 100 chapters nationwide to receive the first annual "Spirit of Contact" award -- presented by Celeste Holm at a prestigious ceremony. For the first time, he says, Wayne felt he had finally risen "a notch above pond scum."

Throughout the years of separation from all his former law enforcement associates, Wayne tried to avoid any situation in which he might meet them. Frank Johnson, however, finally persuaded him to attend one of the reunion picnics. For Wayne it proved to be a rueful experience, as he watched former friends move away from him and up the hillside, talking to each other and pointing his way. Only many years later, again at Frank's urging, did he agree to attend a reunion of Alcatraz officers and their families, where he finally encountered a measure of acceptance.

Frank Johnson remained his only true friend from the period before his resignation from the Marshal Service. They fished together and exchanged visits with each other's families regularly until Frank's death at an advanced age. Wayne wrote and delivered Frank's eulogy at the funeral in 1993. It included the words "Frank was and always will be a great inspiration to me. He was understanding, compassionate, helpful, and kind to all those he cared for." This could easily have been a description of Wayne Ritchie as well.

In March 1999, having largely dismissed the events of 1957 from his mind, Wayne came across an obituary of Sidney Gottlieb in the San Jose Mercury. It described Gottlieb's involvement in secret CIA experiments with LSD, including its covert administration to hundreds of unsuspecting American citizens in the 1950's, stating that there were 149 separate mind control projects with as many as 25 involving

unwitting subjects and that at least one participant died, others went mad, and still others suffered psychological damage.

It "flashed" in Wayne's mind for the first time that he himself might have been one of those unwitting citizens. He suddenly recalled having read a 1977 article about George White's involvement with mind control experiments with drugs given to customers of drug-addicted prostitutes in secret CIA-operated brothels. At this time, because of the additional information in Gottlieb's obituary, it first occurred to him that there might be a connection between Gottlieb, White, covert administration to Americans and his own experience in 1957.

Never previously had he doubted his own responsibility for his wrongful actions and never had he thought of himself as a victim of any kind of "injury" much less a pharmacological one. His guilt had become almost an indispensable "core belief' around which he had attempted to reconstruct his life.

Acting without delay, he visited the local FBI office to see if they might have a record of whether George White had attended the 1957 Christmas party. He spoke to an agent, who advised hint to contact the San Jose Mercury News and speak to the author of the article. .When he did this he was told that Tim Weiner, a New York Times reporter, was the author. After several unsuccessful attempts to reach Weiner, he finally got through by calling person-to-person. During a lengthy conversation he says he got "quite an education" about Gottlieb's and White's activities in the 1950's. He recalls Weiner's comment near the end of their conversation: "It sounds like George White sure did a job on you." Weiner also mentioned that Sidney Bender was handling a similar case against the CIA in New York.

Now convinced that he had finally found a plausible explanation for his "berserk" behavior. Wayne initially looked locally for someone to represent him. He spoke to his church

attorney, who suggested that he contact the San Jose Bar Association. They referred him to an attorney who declined to take the case. At this point, he decided to call Sidney Bender in New York. Mr. Bender suggested he examine the George White diaries at the Perham Foundation especially entries on 20 Dec 57.

Wayne made this inspection and found a diary page from 20 December 1957, which contained the note: "Xmas party -- Federal bldg. press room" and the words "home flu." Subsequently he obtained a copy of the diary page.

After filing. his personal injury claim, Wayne felt that "a great weight had been lifted" from his shoulders. He wept when he called his brother with the news. His mood became more optimistic, and in the past two years he has felt much more at peace. His life style did not change, however, and he and Virginia continue their efforts to serve people in need of help.

For the past two years, Wayne has felt sure that on the day in question, his deranged behavior in 1957 was not some inexplicable reaction to a few drinks at a Christmas party, as he had previously thought. He is now convinced that he was the unwitting recipient of an LSD-like drug administered surreptitiously by George White or one of his associates.

C. <u>Personal History:</u> (See Appendix A for a more detailed account)

Wayne Ritchie was born in Auburn, Washington, in 1927, the youngest of three brothers. When he was six, his family acquired a small lunchroom where Wayne worked long hours starting at the age of eight. When World War II began, he and his brothers enlisted in the Armed Forces as soon as they became eligible.

His family was closely knit, and worked hard to survive the

"Great Depression." Church attendance and Boy Scout activities were important to Wayne but only when his working hours permitted. Social activities and sports were limited by these duties in the lunchroom and his school requirements,. but he and his brothers adopted the work ethic and patriotism of their parents with enthusiasm. Wayne regards his childhood and early adulthood as happy years. There was harmony in the family and discipline, while strict, was rarely required.

Formal education ended in his senior year of high school, which he left just before graduation in order to enlist. Later, however, he was awarded his diploma by mail, based on his high scores on the GED exam, which he took after joining the Marines. Since then he has attended a number of Bible classes but no further academic courses.

Adult employment, before his resignation from the Marshals following the incident on 20 December 1957, included a total of almost ten years of government service as a Marine, prison guard, and Deputy US Marshal. Thereafter he worked as a housepainter until his retirement at age 65.

With respect to social activity, Wayne had little time to date until after he left the Service. Thereafter he had several girlfriends, some of whom he lived with,- before .his first marriage in 1955. He greatly enjoyed socializing with his friends, both male and female. His first marriage was disappointingly brief. In 1957 he met Dorothy, who became his second wife in 1958. When Dorothy revealed that she had a five year-old daughter in Rhōde Island, he arranged to adopt her.

As mentioned, Dorothy's recurring alcohol problems led to her abandonment of Wayne and their daughter in 1962, and he divorced her two years later. His marriage to Virginia in 1968, after a lengthy interim of avoiding further relationships, has worked out very well. It continues to be harmonious after 33 years. Although he has no natural children, he had previously adopted "little Dot." All of Virginia's children, grandchildren and great-grandchildren are important

to him and he has treated this extended family as though it were his own:

Recreational activity before 1958 was varied. He had many friends who, like himself, enjoyed golf, bowling, fishing, hunting, and social get-togethers. Life since then has been simpler, with gradual resumption of fishing and occasional hunting. The time he spends following current events is limited, as are intellectual and aesthetic pursuits. The greater part of his day is spent with his family and in activities related to church.

Medically, Wayne has always been quite healthy, with no significant physical illnesses, injuries or operations. His only significant current medical problem is emphysema attributable to lifelong heavy smoking, which he discontinued four years ago. In July of this year he did suffer a mild heart attack from which he has fully recovered. His only remaining problem is moderate obesity. Psychologically, he had no diagnosed disorders prior to his arrest in 1957.

D. EXAMINATION AND FINDINGS: 1. Records Reviewed: See appendix B.

2. Mental Status Examination:

Mr. Ritchie presented as a friendly, balding, somewhat overweight 74 year-old Caucasian male, who appeared to be in good health. He was fully oriented and alert. Demeanor and posture were attentive and relaxed. He was thoroughly cooperative throughout the interview and all questions were answered without hesitation or apparent evasiveness. Overall credibility was judged to be excellent.

Speech was clear and informative, normal in volume and rate, and free of profanity. General behavior was entirely normal, although he was slightly nervous, never having been examined by a psychiatrist, and obviously aware of the importance of the interview. Body language and facial expression reflected sincerity and candor. Often, he took pains to substantiate his answers to questions with specific factual detail and relevant examples. Always, his attitude was open

and relaxed, with good eye contact. No idiosyncrasies of speech or behavior were noted.

Thought processes were linear and relevant to the topic at hand. Perception, both by history, and as observed, was clear and free of distortions. There was no evidence of paranoia, delusional or eccentric ideas, ideas of reference or other disturbance of logical thinking. Comprehension, abstraction ability and general cognitive functions were unimpaired. Intelligence was estimated to be in the upper range of normal. General knowledge and awareness of current events were quite good in spite of his limited formal education.

Mood was sanguine, and feelings displayed were warm and appropriate. Briefly. al one point, he seemed to be approaching tears while discussing the more painful aspects of his history. (He commented after the interview: "I'm glad I didn't start crying.")_ A cheerful attitude and sense of humor, however, were generally present throughout the interview. Anger and attempts to dramatize his history were notably absent. Charac-- terological traits of modesty, compassion and honesty were evident. Judgment and insight appeared to be good, both historically and at present. Overall, the mental status examination was completely within normal limits.

2. Differential Diagnosis:

As indicated previously, Mr. Ritchie's actions on 20 December 1957 were completely uncharacteristic of any he displayed before or after that d#, whether drinking or not.

The effects of alcohol alone do not explain the perceptual distortions, paranoid delusions. depression, poor judgment and loss of reality testing, nor the attempted commission of an illogically conceived, and ineptly executed criminal act.

Mr. Ritchie's brief episode of unnatural behavior could be considered psychotic by some definitions. Because of its acute onset without pre-existing psychopathology, premonitory signs of psychiatric illness, precipitating stress factors, or subsequent recurrence or progression, however, it fails to meet the criteria

for any DSM-IV category of naturally occurring psychotic illness. Nor does it correspond to a naturally occurring mood, anxiety, or personality disorder because of, among other things, its brevity, lack of previous symptoms and absence of persistence, recurrence or further progression.

Neurological explanations (for example, psychomotor seizures, stroke, brain tumors, poisoning, *or* infections) would undoubtedly manifest themselves in other ways. No behavioral or physiological abnormalities before or since the event would support any of these possibilities. Metabolic disturbances that might conceivably produce such behavior are likewise remote and improbable explanations.

In my opinion, the only plausible explanation for the mental and emotional changes accompanied by the bizarre behavior shown by Mr. Ritchie on the day of his arrest is the ingestion of a pharmacological agent. Such a substance would of necessity be capable of causing paranoid delusions and impulsive irrational behavior with a time course of 8-12 hours in someone previously free of any recognized psychiatric disorder.

Since alcohol was thought to be the explanation at the time, the current DSM-IV list of alcohol-related disorders should be examined closely to see if any of them might reasonably apply to Mr. Ritchie's case.

First, and perhaps most likely to be considered as a possible diagnosis of Mr. Ritchie's episode of disturbed behavior, is uncomplicated alcohol intoxication Four criteria are listed in DSM-IV, all required for this diagnosis. The first is "recent ingestion of alcohol", already documented in the initial history. DSM-IV does not specify any quantity of alcohol, time period, or degree of intoxication under this criterion. The close relationship between degree of intoxication and number of drinks consumed within a particular time frame is, however, widely recognized.

A blood level of 0.1% is a commonly accepted threshold for legal intoxication, which usually results in failure on a

legally conducted roadside sobriety test. This level is achieved in the average young male after consumption of seven ounces of 80-proof alcohol in a 20 minute period, as found in a study of normal volunteers in which I participated as investigator. Other controlled studies have reported similar results.

Alcohol is detoxified at a fairly uniform rate: approximately one ounce of 80 proof alcohol per hour, and somewhat more in those who drink frequently. Eight ounces of bourbon for example would, in a person accustomed to frequently consuming this much or more at social events; would be almost entirely eliminated in 6-7 hours.

Wayne's history indicates that no more than five ounces of alcohol were consumed in the first 3 hours of his drinking at the Christmas party. Adding the subsequent two drinks between 5 and 8 P.M., the total amount consumed in 8 hours was not more than the equivalent of 6-7 ounces of 80-proof alcohol, most of it between noon and '3:00 P.M. As discussed, this amount would be almost totally metabolized and eliminated within an 8-hour time period, which virtually rules out the possibility that Wayne's blood level could have even approached the level of 0.1% at any time prior to the attempted robbery.

An additional consideration is that Wayne reports having actually consumed as much as 25 drinks over an 8-hour period on some social occasions without becoming severely intoxicated. The ability to drink this much is an indication that significant tolerance had probably developed. The nervous system "learns" to compensate for the effects of alcohol by chemically reducing its sensitivity to alcohol. In addition, specific receptors known to be directly affected by alcohol also become altered so that they are less responsive to its effects: Also, certain liver enzymes tend to be activated by alcohol (and other drugs), speeding up the elimination of alcohol and reducing the duration of its effects. Finally, the regulation of behavior at higher levels is also adaptively altered to compensate for alcohol-induced impairment of function. This

adjustment may be visualized as a learned modification of the manner in which alcohol-induced stimuli are processed.

In summary, as concerns the first criterion of alcohol intoxication, Wayne did indeed drink, but he did not drink enough in a short enough time to be legally intoxicated. Also, because of his extensive experience with alcohol, he was able to handle alcohol better than the infrequent drinker, displaying less intoxication after a given number of drinks..

The second criterion for alcohol intoxication as given in DSM-IV is: "clinically significant maladaptive behavior or psychological changes (e.g. inappropriate sexual or aggressive behavior, mood liability, impaired judgment, impaired social or occupational functioning) that developed during, or shortly after, alcohol ingestion."

It is clear that clinically significant maladaptive behavior and psychological changes indeed occurred in Wayne's case. He did not, however, show mood liability (i.e., rapid shifts from euphoria to depression), even though he certainly became increasingly depressed (based on the delusion of rejection). He also definitely showed impaired judgment.

In summary, with respect to the second criterion, maladaptive behavior and psychological changes did occur, but these changes were not, in my opinion, of the type generally associated with alcohol intoxication per se. DSM-IV uses only general terminology in describing the changes produced, and Kaplan and Sadock note that common sense and clinical experience is required to decide whether particular abnormalities of behavior should be attributed solely to alcohol. In my opinion they are not in this case, nor do they resemble the changes produced by alcohol on previous occasions when Wayne admittedly consumed even larger amounts of alcohol.

The third DSM-IV criterion requires the presence of one or more of the following signs, developing during, or shortly after,

alcohol user slurred speech, incoordination, unsteady gait, nystagmus (a term referring to jerky eye movements), impairment in attention or memory, stupor or coma. There is no indication that Jim Eagan observed slurred speech, incoordination or unsteady gait, else he would have suggested Wayne was unfit for duty. No information is available concerning nystagmus in this case, since he was not examined by a physician until much later. Attention and memory were intermittently impaired, but as discussed later, in my opinion this is more probably attributable to LSD's known effects of this type.

Wayne's inability to recall all aspects of the episode later has been discussed, and appears to have been limited to certain details_ These gaps can be attributed either to nonnal forgetting over a period of 44 years or (as is my opinion) to the peculiar effects of LSD which typically produces selective inattention and selective amnesia. Stupor and/or coma were not present. Indeed, as pointed out, he remained fully conscious (except when knocked out by a blow to the head) and did not lapse into a state of sedation or sleep. This is a meaningful clue to the diagnosis.

Fatigue and at least a temporary period of sleep or marked drowsiness are typical after a period of alcohol intoxication. LSD, on the other hand, due to its stimulant action, actually prevents sleep. In Wayne's case he remained awake all night in a state of agonizing remorse and agitation. This strongly suggests that alcohol intoxication was not responsible for his disturbed conduct, since as just noted, coma, stupor, or at least drowsiness and sleep are typical at the end of a period of alcohol intoxication. Wayne's sustained excitation is not in accord with the third diagnostic criterion:

The fourth criterion requires that the symptoms not be due to a general medical condition and not be better accounted for by another mental disorder. This criterion also fails to be met, in my opinion, since LSD-intoxication better accounts for it.

Based on the above analysis, the diagnosis of alcohol intoxication as the explanation for Wayne Ritchie's temporary deranged behavior is not tenable. As to other alcohol-related diagnoses listed in DSM-IV (alcohol withdrawal, alcohol-induced persisting dementia, alcohol-induced persisting amnestic disorder, and alcohol-induced psychotic disorder) these also can be rejected. The one remaining category of "other alcohol-induced disorders", however, deserves additional discussion.

It is certainly appropriate, as mentioned earlier, to regard Wayne's episode as a temporary psychotic disorder. Alcohol-induced psychosis, however, consists mainly of hallucinations and/or delusions, which generally occur after, and occasionally during, a prolonged period of heavy drinking. (This was not the case with Wayne, who had not been drinking chronically.) Hallucinations tend to be prominent, and are generally auditory, consisting of voices which are generally "maligning, reproachful, or threatening, although some patients report that the voices are pleasant and nondisruptive." Delusions may also occur. Actual hallucinations did not occur in Wayne's case, although delusions did indeed develop.

Alcohol-induced psychosis is described by Kaplan and Sadock as a rare condition, especially when it occurs during the period of intoxication. A more important consideration, however, is that this form of psychosis is associated with a prolonged period of heavy drinking and generally persists for days or weeks if untreated. This certainly would not apply to Wayne's case which occurred in a setting of consistently sober behavior on the job for more than three years, no history of heavy nightly drinking, and a brief time course of psychosis with gradual onset and rapid resolution.

Alcohol-induced mood disorder is likewise not tenable. As mentioned DSM-IV allows this diagnosis only when clinical judgment suggests that alcohol is the probable cause of the mood disorder. Prior responses to alcohol, and the absence of a

history of mood disorder prior to the episode indicate to me that alcohol cannot be considered to have caused his depression. Actually, depression in the usual clinical sense did not appear until after he had recovered from the period of intoxication. Feelings of depression developed only in the wake of the delusion of rejection and the associated deep feelings of disappointment that this delusion produced.

Later, Wayne developed a more typical form of clinical depression as a consequence of the destruction of his career and reputation along with a persisting conviction that he was a bad person. None of this, in my opinion, would have occurred as the result of alcohol, consumed gradually and in moderate amounts by a man who had never had any adverse reaction under comparable circumstances.

The same line of reasoning applies to the rejection of the diagnosis of alcohol-induced anxiety disorder (he did not generally suffer from anxiety, even in dangerous situations, and never as a result of drinking.) Likewise, sexual dysfunction and sleep disorder due to alcohol did not occur and are not even relevant to the behavior in this case. Wayne's insomnia that night was not the kind that drinking can cause, which usually appears after an initial period of seemingly normal sleep. This sort of insomnia is a common problem among habitual evening drinkers. Mr. Ritchie was not a chronically heavy drinker and ordinarily had no sleep problems.

Finally, there is a category called idiosyncratic alcohol intoxication, which is not recognized by DSM-IV as an official diagnosis. As pointed out by Kaplan and Sadock in their textbook, it is a "controversial diagnosis." Terms such as "pathologic, complicated, atypical, and/or or paranoid" have also been applied to this type of intoxication, but, as the authors point out, "Several well-controlled studies of people who supposedly have the disorder have raised questions about the validity of the designation."

Kaplan and Sadock go on to summarize anecdotal reports

in which the diagnosis of idiosyncratic alcohol intoxication has been applied to individuals. They are often described as confused, disoriented, and experiencing illusions, transitory delusions, and visual hallucinations. Increased psychomotor activity and impulsive aggressive behavior can occur, which may be dangerous to others, and may include suicidal ideation or attempts. Such behavior usually last for a few hours and terminates in a prolonged sleep, with later inability to recall the episode on awakening. Predisposing factors include brain damage, advancing age, the use of sedative-hypnotic drugs and feelings of being fatigued. An example is a shy person becoming belligerent and aggressive after one weak drink.

In my opinion, this diagnosis is not psychiatrically credible in this case. The ab sence of sleepiness, full recall of the criminal behavior, and lack of any of the predisposing factors mentioned, all rule against it. In particular, the example given by Kaplan and Sadock of the shy individual undergoing a dramatic change after a single weak drink would certainly not apply.

On the day in question, Mr. Ritchie consumed an estimated total of 6-7 drinks over a period of about eight hours. Pharmacological studies of healthy non-alcoholic volunteers have demonstrated that this amount of alcohol is almost completely metabolized within such a time period. Furthermore, most of Wayne's drinking at the party took place within three to four hours, with only two additional alcoholic drinks consumed in the next four to five hours. This would leave only mild to moderate residual effects at the time of the attempted hold-up. Additionally, Mr. Ritchie was well acquainted with alcohol and its effects; and undoubtedly had built up various mechanism of tolerance through his considerable intermittent use of alcohol socially'. These factors would tend to diminish further any alcohol effects that might still be present.

There are other facts that rule against the idea that alcohol intoxication alone can be held to blame for what happened:

During the period following his head injury, arrest, surgical care, booking and incarceration, there is no record that Mr. Ritchie showed signs of gross intoxication. No blood alcohol test. was. performed which would have suggested alcohol intoxication.

In short, none of the alcohol-related diagnoses explain Wayne's bizarre departure from realistic thought, feelings, and behavior on 20 December 1957.

* * * * *

The type of intoxication that does apply is that of the LSD-type, included under hallucinogenic intoxication in DSM-IV. There are, of course, many drugs that can cause hallucinations and the effects they produce are extremely varied.

Overdose with antihistamines, belladonna alkaloids, bromides, antidepressants, antipsychotics, and many other commonly prescribed medications can result in delirium,-. . which is a disturbance in brain function in which realistic (especially visual) hallucinations are prominent. Delirium, however, also is a state of gross confusion, disorientation, and disorganized speech, inability to comprehend or carry out simple instructions, primitive movements and phantom behaviors, fluctuating consciousness, disruption of even simple sequences of learned behavior, and other features which clearly distinguish it from what Mr. Ritchie experienced. Post-delirium amnesia, usually obliterates most of the events from memory. Mr. Ritchie remembers clearly many of the events that occurred during his departure from normality,.

The hallucinogens referred to in DSM-IV are those which have "psychedelic" qualities, and in fact true hallucinations (such as those that occur in delirium) are not generally present. In a sense, the term hallucinogen, when applied to psychedelic drugs, is not especially appropriate (as I and others have discussed in previous publications.) Nevertheless the term is probably understood more easily than "psychedelic," a term meaning "mind-manifesting" which was introduced by Osmond

in the mid-1950's. It was coined to reflect the unique features of drugs which share the common feature of an indole structure and strong psychological effects which differ from the traditional categories of drugs such as stimulants, depressants, opiates and other analgesics, sedativehypnotics, anesthetics, inhalants, deliriants, those with mixed features such as marijuana and PCP, and therapeutic agents such as antidepressants and antipsychotics, mood stabilizers, antihistamines, etc.

Among the known psychedelic drugs, LSD is the most familiar and the most widely studied. It is a synthetic drug whose effects in humans were first published in the early 1940's. By the mid-50's it had gained the interest of many scientific groups both civilian and governmental. So much has been written about it that a detailed summary cannot be given here but there are many authoritative sources of such detail, some of which are included in the references in Appendix B.

What took place in Mr. Ritchie's case exemplify the effects of an hallucinogenic drug such as LSD. The covert addition of a moderate dose of LSD into a drink consumed at the party he attended would most readily explain what transpired. In particular, the change from a normally cheerful Mr. Ritchie into a depressed, paranoid, agitated person, who not only experienced perceptual distortions characteristic of psychedelic intoxication, but acted on his paranoid beliefs by carrying out an illogical andinept attempt at armed robbery is not, in my opinion, credibly explainable by any other scenario.

Understandably, without familiarity with LSD, alcohol effects might be considered to be the most likely cause of Ns uncharacteristic behavior. Alcohol intoxication alone, however, cannot explain all the alterations of mood, perception, and behavior that occurred (as previously discussed in detail.) Furthermore, in 1957, LSD was not a "street drug" and was mostly available only to a small and not widely publicized group of researchers. in the civilian academic community,. and certain secret government agencies. It is not surprising that no one made

a diagnosis of an LSD-induced disorder. Those involved in the case, evidently unfamiliar with the details of LSD intoxication, had little choice but to presume that an unusual reaction to alcohol had occurred. Since covert administration of LSD to unwitting ordinary American citizens was a government approved activity not revealed to the public until decades later, it would of course not have been suspected.

It is clear that what Mr. Ritchie did, and why he did it, was, to him, unexplainable. As the effects of the drug wore off (in 8-12 hours as would be expected) he was at a total loss to account for his indefensible, grossly criminal and (in his opinion) "traitorous" behavior. He had always been a competent, law-abiding person, both on and off the job. Even when drinking much larger amounts, as he had done numerous times at social gatherings, he had never departed from his deeply held standards of proper behavior. He was left with no understanding of why he had felt and acted as he did on 20 December 1957, and as a result suffered years of self-reproach, and other disabling symptoms. Furthermore, his career in government service was irrevocably ended.

From a psychiatric standpoint, what Mr. Ritchie did during the several hours in which he abruptly stopped behaving as a loyal and efficient deputy marshal and became instead an incompetent outlaw, intent on his own destruction, can appropriately be viewed as a dissociative episode. As pointed out by several experts, LSD is known to be capable of producing dissociative reactions of all types.

The term "dissociative" refers to a disruption in the normal integration of thoughts, feelings, and behavior that generally prevail in the normal individual. There is a temporary disassociation, or split, in the personality,' by mechanisms that are not fully understood. In effect, the individual becomes "someone else" who does not behave in the ordinary manner, and does things he or she would never do under ordinary

circumstances.

A comprehensive discussion of the nature and differential diagnosis of dissociative disorders is given in Kaplan and Sadock's Synopsis of Psychiatry, widely accepted as an authoritative textbook. It provides descriptions of a number of subtypes of the disorder, as listed either in DSM-IV or in the International Classification of Diseases (ICD-10). These include dissociative amnesia, fugue, stupor, trance, motor disorders, convulsions, anesthesia, and sensory loss, amnesia, identity disorder, and other. Several of these subcategories possess features that might apply to Mr. Ritchie, but none of them -- except "other" -- can explain the totality of his reaction.

A dissociative reaction induced by LSD intoxication, on the other hand, would be an "other" form of dissociative disorder, that does account for all of the symptoms reported. The time course of the various aspects of Mr. Ritchie's feelings and behavior on 20 December also corresponds to the known time course of action of this drug. The perceptual distortions he describes (e.g., being in a tunnel, floating along the sidewalk) are characteristic of LSD effects, as are the progressive sense of rejection, depression, and impulsive illogical behavior.

LSD has strong stimulating effects that almost always prevent sleep for many hours. This fits with the fact that Mr. Ritchie did not sleep all night on 20 December 1957. Alcohol intoxication is usually followed by a period of drowsiness and sleep, and in cases of heavy intoxication, the individual may "pass out" or become stuporous. (When insomnia follows alcohol intoxication it generally occurs several hours after a period of initial sleep, which does not apply in this case.)

The fact that he at no time was unable to function in the ordinary sense of speech, coordination, and execution of acts requiring the processing of ideas and formation of plans eliminates the diagnoses of stupor, convulsions, anesthesia, sensory loss or motor disorders.

The uninterrupted knowledge of who and where lie was, the lack of extensive post-episode amnesia, the lack of any

pre-existing psychological disorder, the lack of any significant stress factor, and the lack of recurrence or progression of the phenomena that occurred -- all these speak even more forcefully against the diagnosis of any naturally occurring dissociative state. His insistence on assuming full responsibility even though he could not explain his actions, and his expressed wish to commit suicide and to be severely punished, both represent a state of extreme contrition, reflecting the strong emotional after-effects of LSD-induced behavioral aberrations. In contrast, a bland indifference, or a disoriented state of mind often follows naturally occurring dissociative reactions.

LSD is often popularly thought of as a recreational drug, taken to get "high" or to experience an unusual, perhaps beneficial, alteration of consciousness. It is often described as producing fantastic imagery, and heightened sensory awareness. But these descriptions have generally come from individuals who have received the drug with full knowledge and consent, often at their own request. When the drug is given in a favorable situation, in the presence of a reassuring individual, impulsive, undesirable behaviors and fear of insanity is less likely.

Covert administration can frequently produce extremely more dangerous conse-

quences. This was clearly the case with Frank Olson, an Army scientist.' .

John Marks' discussion (in The Search for the Manchurain Candidate) of the Frank Olson case contains much that is relevant to Wayne Ritchie's experience. On 19 November 1953, Olson was one of a group of scientists who attended a meeting with Dr. Gottlieb and Dr. Lashbrook at Deep Creek Lodge in Western Maryland. Olson had been a respected Army employee for ten years. devoted to his family, outgoing in personality, and popular among his many friends. After two days at the lodge, in the

evening, shared a drink of Cointreau with all but two of the men present. Dr. Gottlieb and Dr. Lashbrook had spiked the Cointreau with LSD, unbeknownst to the scientists, and all agreed in congressional testimony that they had no advance warning.

According to Ben Wilson, one of the scientists, "Once the drug took hold, the meeting deteriorated." It broke up, and Wilson recalls that "Olson was psychotic. He couldn't understand what *was* happening. He thought someone was playing tricks on him."

Marks writes: "Most of the men, including Olson, could not sleep and several like himself were still agitated and severely disturbed when they gathered in the morning. No one wanted to do more business. They all straggled home during the day. Alice Olson remembers her husband coming in before dinner that evening. 'He said nothing. He just sat there. Ordinarily when he came back from *a* trip, he'd tell me about the things he could'....Later that night Frank Olson told his wife he had made 'a terrible mistake,' that his colleagues had laughed at him and humiliated him. Mrs. Olson assured him that the others were his friends, that they would not make fun of him. Still, Olson would not tell her any more. He kept his fears bottled up inside, and he shared nothing of his growing feeling that someone was out to get him..."

After a depressing, uncommunicative weekend, "Olson appeared at 7:30 AM. in the office of his boss, Lieutenant Colonel Ruwet. To Ruwet, Olson seemed 'agitated.' He told Ruwet he wanted either to quit or be fired. Taken aback, Ruwet reassured Olson that his conduct at the lodge had been 'beyond reproach.'" According to Marks, Olson continued the next day to feel "all mixed up" and questioned his own competence. "Olson alternately improved and sank deeper and deeper into his feelings of depression, inadequacy, guilt, and paranoia." He was therefore taken to New York to see Dr. Abramson, an LSD expert, who tried to help him. This was not

very successful, and on a second trip to New York arrangements were made for him to be hospital-

. ized at a Rockville, Maryland, sanitarium. The night before this could be brought about he committed suicide by throwing himselfthrough a window on the tenth floor of the Statler Hotel, where he and Lashbrook were sharing a room.

In 1976, the Government admitted that LSD was the cause of Olson's suicide. President Ford also offered the family a personal apology. Many aspects of Olson's tragedy bear a striking resemblance to what Wayne Ritchie experienced. In particular, his confusion, sense of inadequacy, belief he was being laughed at, feelings of guilt and humiliation, unwillingness to share his deepest thoughts, decision to resign, and determination to commit suicide are remarkably similar in both cases. Prior to their unwitting ingestion of LSD, both men were generally regarded *as* outgoing and free of any psychiatric difficulties, but changed dramatically and persistently immediately thereafter.

Similar but less extreme negative effects were described to me in 1961 by the Commanding General and also by a Major at Edgewood Arsenal who had received LSD covertly under analogous conditions more than a year earlier. They both had unpleasant, stressful experiences, even after guessing correctly that they had been given LSD in their coffee that morning. They were also angry about it despite being career Chemical Corps officers who supported the research being done with LSD and related drugs. Experts invariably warn against the serious hazards of giving the drug to someone without his knowledge.

Covert administration of LSD deprives the recipient of any protective set (i.e. psychological preparedness) to help him cope with subsequent aberrant ideas and impulses. Unexpected dosing is likely to cause severe anxiety and confusion. If aberrant behavior is precipitated, subsequent embarrassment and feelings of shame or guilt are predictable, especially in someone lacking prior experience with the drug.

Thus, even moderate doses of LSD, if unknown to the recipient can be expected to lead to severe distress. In Wayne's case, self-condemnation, decision to resign from the Marshals and ensuing psychiatric disorders might have been avoided if he had been told soon after the event that he had been acting under the influence of LSD.

The nature of the response to LSD is influenced by other factors, even when it is taken voluntarily and under favorable conditions. These factors, usually referred to as "set and setting", have long been recognized, initially by investigators, but by now by almost everyone who uses the drug.. Basically these terms refer to the personality of the individual and the environment in which the drug is used, each of which is important in shaping the response. Existing personality traits tend to become exaggerated, and various features of the environment may dramatically alter the intensity and content of the subjective experience.

The term "set" is broadly inclusive. The more consistent aspects of personality (e.g., learned patterns of behavior, moral and ethical standards, interests, goals, abilities, temperament, belief structure, etc.) are important determinants of the effects of a drug such as LSD. The prevailing internal state of the individual (e.g. degree of alertness, fatigue, anxiety, task at hand, current concerns or anticipation of imminent events) must also be considered.

Mr. Ritchie, at the time of his unexpected drug-induced reaction, was a healthy young man. lacking in eccentricity, and possessed of high moral and ethical standards. He had a record of strong loyalty to the government service and constantly aspired to maintaining and improving his skills. He says he had always thought of himself as a practical, efficient officer. He was emotionally stable and believed strongly in the importance of accountability and reliability in both his personal and professional life. "I would rather be 25 minutes early than a minute late" was one of his comments. His deportment had

always been consistently relaxed and cheerful, energetic and compassionate. He certainly did not have criminal or antisocial tendencies. Wayne was, as one might say, a solid citizen, highly regarded by peers and superiors, and respected for his diligence, generosity, and loyalty.

Furthermore, the environmental "setting" on the day of Wayne's bizarre experience and atypical criminal behavior was not ostensibly unusual. If anything, there was a pre-holiday spirit, and while at the party he was mildly euphoric (his usual response to a few drinks) and felt quite willing to help out by filling in at the office for the last five hours or so of a routine day. His relationship with his associates, family, and girlfriend were much the same as always. There was no particular stress or unusual pressure that might have caused him to be out of sorts, worried or depressed. Overall, set and setting were not remarkable, with one important exception: he was not expecting to be given LSD, nor was he able to recognize its effects. The consequences were most unfortunate.

Covert administration of LSD deprives the recipient of any opportunity to prepare for the unfamiliar, distorted sensations and thought patterns it is known to evoke. Unexpected thoughts and perceptions cause an alerting response. They must be evaluated and interpreted. In Wayne's case, the idle notion that other officers might be sitting at home laughing at his situation in the office began, perhaps, as a random intrusive idea. LSD, however, tends to take a thought and "run with it". It stimulates "free associations" normally kept under control by one's ordinary judgment, and suspends the ability to test reality.

Thus, an otherwise fleeting supposition tends to expand and become more encompassing as the effects of LSD take hold. Wayne's belief that he was being laughed at, instead of being dismissed as an idle thought, unaccountably grew into the idea that the other officers did not want him around. Limited at first, the idea increased in scope to include an ever

increasing circle of rejection: first the people across the hall, then those in the next office, then Dorothy, then his bartender friend Tony, and finally the entire organization for which he had happily worked for more than three years.

His attempts to deal with this growing despair and sense of rejection were remarkable. He did not wish to cause suffering to others, even though he himself was now suffering intensely. His solution, seemingly logical at the time, was actually so lacking in judgment and out of touch with reality that it might be considered a form of temporary insanity. Everything he did after about 4 PM, while perhaps not appearing bizarre to a casual observer, was actually quite bizarre for Wayne, and completely incongruous with his usual behavior. Specifically, he deserted his post, walked home instead of taking his car, overreacted to Dorothy's familiar comment about San Francisco vs. New York, left their apartment without discussion, returned on foot to his office, armed himself with two weapons (for the first time in his life), drove to a part of town he never frequented (except in the line of duty), and attempted to hold up a bartender for $150 to buy his girlfriend a plane ticket to New York. (The fact that he could easily have borrowed this relatively small amount from his boss or his friend Tony was pointed out to him later, and he saw the logic of this observation, but at the time this simple solution did not occur to him due to his preoccupation with the illogical plan he had chosen.)

Despite this display of energy and determination, Wayne says he was not in a state of rage and did not have any wish to inflict injury. Instead of being angry when he became convinced that he had been unfairly rejected, he says he was aware only of a feeling of disappointment and sadness. Unlike the usual holdup perpetrator, he was easily distracted by a simple question from a waitress and knocked unconscious. For this to happen to Wayne, a man trained in all the arts of police work, arrest procedures, and hand-to-hand combat, is inexplicable. It is psychiatrically reasonable to say he was under the influence

of a drug such as LSD and that his vigilance was temporarily disrupted. It is not psychiatrically reasonable to assume that the relatively small amount of alcohol consumed could alone cause this much ineptitude.

LSD readily enters the brain when ingested, injected or inhaled. A tenth of a milligram, i.e., 100 micrograms (mcg), can produce significant changes in all aspects of mental activity including mood, perception, and emotion. It also degrades the ability to integrate information effectively, and to make reasonable decisions. Some non-specific physiological effects also occur, affecting pupillary size, heart rate, body temperature, gastrointestinal motility and other bodily functions, but these are not usually diagnostically useful, since they tend to be moderate and transient, not at all obvious to casual observers.

The time course of LSD effects is fairly predictable. Following absorption, brain levels rise rapidly to a peak at 2-3 hours, and then subside gradually, with half of what remains at any time leaving the body by metabolic breakdown every three hours. This means that a dose of 150 micrograms (roughly a sixth of a milligram) would be 90% eliminated within about 12 hours, a clinically negligible amount.

Measures of cognitive performance ability (e.g., simple arithmeticskills) show changes parallel to the blood level, returning to baseline Within this time frame. Doses of 50mcg have been found to cause a maximum decline in speed and accuracy of about 20%. 100mcg. impairs perfonnance by about 50%, and 200mcg or more usually disrupts the capacity for all tasks requiring a high level of mental concentration by close to 100% for several hours. There is quite a bit of variation among individuals in the degree of cognitive impairment (from mild to severe) within this dose range.

Complex tasks, especially those requiring critical judgment and concentration, may become almost impossible during the period of peak effects. Simple well-learned tasks such as speech, ambulation, and the ordinary operation of vehicles and weapons,

on the other hand, may remain largely intact. In studies with military volunteers, coordinated activity such as marching in formation, organizing an intelligent response to a simulated military challenge, and other types of novel problem solving, can become almost impossible. An oral dose of 150mcg caused a highly disciplined squad of trained Commando troops to become disorganized within two hours, and unable to intelligently execute a mock combat exercise. In 1965 I had the opportunity, at Porton Downs, England, to review a classified film documenting this experiment, and observed this dramatic breakdown in individual and group function.

Such mentally disruptive phenomena can be partly explained by LSD's actions on serotonin systems. Serotonin is produced in the brainstem, and influences many high level information processing systems. The disruption is attributed to a reduction in the normal filtering-of sensory input; allowing both relevant and irrelevant information to. affect analytic and executive functions of the cerebral cortex. Subjectively this is experienced as a flood ofinput, with many unwanted and unnecessary thoughts and perceptions emerging into consciousness. Some find this flood of information exhilarating and illuminating, but others find it disturbing and frightening.

Another aspect of this lack of filtering of input is a variety of changes in the perception of the world and its meaning. Experimental subjects sometimes find assigned: tasks to be suddenly silly or irrelevant, and not worth attempting. Critical assessment of one's own behavior is temporarily impaired. New ways of looking at things may lead to what seems like nonsensical or perverse behavior to the investigators, although quite appropriate to the affected volunteers.

As mentioned above, "set and setting" play an important role in determining the subjective effects. Set controls the expectations with which an individual approaches the LSD experience and guides the direction of the "trip". When given to

psychoanalytic patients the result may be rich fantasy material related to topics being addressed in therapy. Thrill-seekers on the other hand, may experience wild trips through bizarre otherworldly environments. Introspective intellectuals may experience deep insights into an inner space that seems to possess an infinite all-encompassing quality (which usually cannot be coherently described later.) When there is no preparation there is no appropriate set and this is almost always a recipe for a "bad trip".

My personal experience with LSD helps me understand Mr. Ritchie's description of his own "trip" on 20 Dec 1957. His narrative bears a remarkable similarity to some of my own recollections from the :1960's as well as descriptions provided by normal volunteers whom .I tested during that period under controlled conditions. Some events during the period of LSD drug action are vividly recalled, while others are largely forgotten. This is not total amnesia (as in naturally occurring dissociative amnesia, described in DSM-IV) Rather it is "selective memory" focusing on particular significant occurrences, while ignoring much that seems irrelevant or unimportant.

In Wayne's case, an example of this form of amnesia would include, for example, the inability to remember any specific individuals who may have been present during his second visit to the party, or any awareness of people on the street when lie was walking home from the office. On the other hand, those incidents which seemed important at the time are remembered "as though it were yesterday" -- no doubt due in part to his having repeatedly "relived" mentally the most distressing events of that day. The "unreal" sensations that he recalls (e.g. gliding along the sidewalk effortlessly, or feeling like he was in a "tunnel") are LSD effects similar to what others have described, which he remembers clearly because they were so strange and never before experienced.

In contrast to LSD, the neuropharmacological effects of

alcohol on the other hand are much different and, in a sense, almost the opposite of those caused by LSD. Alcohol actually inhibits, for example,' some of the same neurotransmitter systems that are. excited by LSD. Alcohol's initial relaxing effects can probably be attributed to the fact that alcohol receptor sites are closely associated with those that respond to anti-anxiety drugs in the Valium family. Alcohol also tends to inhibit the stimulating effects of glutamate on NMDA receptors, while LSD indirectly stimulates these same receptors.

Alcohol euphoria is probably partially mediated by dopamine receptors that also respond to "rewarding" drugs such as cocaine. It produces pleasurable effects and temporary expansiveness. Inhibition of neocortical systems that are responsible for learned behavioral constraints may therefore actually result in "disinhibition" of social behave

- ior. This is a short-lived "cocktail party" effect that usually subsides with the cessation of drinking, as energy declines, and fatigue and sedation tend to set in. This sequence of mood and energy changes does not resemble what Wayne Ritchie experienced.

Scientifically controlled studies of the effects of alcohol and LSD in combination have not been reported, to my knowledge, in any widely read peer-reviewed publications. It is now known, however, that this combination was commonly used in covert operations by the CIA *in* the 1950's. Alcohol, and at times drugs such as amphetamines, have reportedly been used by some individuals (in informal settings) to reduce the intensity of the anxiety produced by LSD, but these data are anecdotal.

It is reasonable to ask why Wayne develop the particular delusion of rejection.

Why did Wayne fixate on the simple thought that his colleagues might be joking about his having to sit in the office on a Friday afternoon before Christmas, and proceed to elaborate this into a delusion of virtually universal rejection by everyone, including those he did not even know?

In my opinion the answer lies in his keen concern about how his job performance was perceived by peers and superiors. Above all lie wanted to please, and be thought well of. He took pride in his punctuality and his perfectionism, and even tried to exceed the expectations of his bosses by finding ways to improve things. Examples include offering to train a blind worker, his volunteering to learn the skills of

transporting prisoners from Alcatraz on his own time, his recognized acquired skills in weaponry leading to his selection as team leader and instructor, and his unusual initiative in undertaking the seemingly impractical task of restoring unusable and outdated automatic weapons to like-new condition when placed in charge of the Marshal armory.

Further examples of Wayne's concern for others and wish to set a good example include his empathy for prisoners, his perseverance in trying to help Dorothy to abandon her abuse of alcohol and become rehabilitated in spite of her repeated relapses. There are many more, including his concern for his parents (in spite of his father's rejection post the 1957 event) and his cheerful readiness to adopt and care for Dorothy's young daughter and later the offspring and extended family of his current wife Virginia. These traits can no doubt be traced to childhood when he first showed enthusiasm for his duties in the family lunchroom, even at the expense of his other interests. They are enduring parts of his personality, arising from a combination of heritable family traits and a highly moral upbringing.

Wayne was (and is) an unusual person, caring and conscientious far above the ordinary. Latent concerns relating to his job performance (as perceived by others) in my opinion explains why, while tending the desk alone on 20 December 1957, he began to ruminate about how well he was being thought of. From this seed of doubt developed an all-consuming, overpowering conviction that he was disliked, rejected and in effect an outcast -- someone who must stop

being an annoyance to others by removing himself from life.

It is the ensuing psychiatric disorders, primarily attributable to the drug reaction and its consequences, however, that constitute the greater part of the Mr. Ritchie's personal injuries. Initially he was in a state of psychological shock, humiliation and profound demoralization following his short-lived departure from sanity. Many symptoms then developed in the wake of his self-diagnosed "traitorous" behavior, constituting what is now called post-traumatic stress disorder (PTSD).

When first introduced, the diagnosis of PTSD was considered applicable only when some catastrophic or life-threatening event had been witnessed or experienced. Examples would include plane crashes, serious fires, explosions, torture, rape, murder, .or severe injury. Later, the definition of "trauma" was expanded to include events that,

although not life-threatening or objectively catastrophic, have an unusually severe personal impact. In Treatment of Psychiatric Disorders (American Psychiatric Association, 1989) the chapter on PTSD notes that "extreme grief ... can legitimately be considered, in some cases, to lead to this disorder." The severity and chronicity of the response are given greater weight than the event itself.

For Mr. Ritchie, the traumatic disaster was the collapse of his world, the shame of having committed an unforgivable act. Recurrent flashbacks, intrusive reliving of the event, severe sleep disturbances, repetitive nightmares, profound depression, avoidance of situations or persons reminiscent of the trauma, numbing of emotions, inability to form loving relationships -- these are among the features that characterize PTSD. Mr. Ritchie suffered for years from these symptoms.

Mr. Ritchie also developed severe, chronic depression. Guilt, pervasive feelings of worthlessness, hopelessness, loss of ambition, self-imposed austerity, and suicidal ideation are the most obvious symptoms. They were persistent, subsiding only

gradually after many years.

Major Depression would be an acceptable diagnosis. Owing to some atypical features (unusual circumstances of onset, duration, remission, lack of family tendency or known risk factors, and atypical time course) the more appropriate diagnosis is Depression NOS (not otherwise specified).

4. DSM-IV Diagnosis:

Axis I: a. **292.89 Hallucinogen-induced psychotic disorder, with delusions, and with onset during intoxication,** due to covert administration of LSD or an LSD-like substance on 20 Dec 1957. Characterized by delusions of rejection, paranoid ideation, abnormal kinesthetic and visual perceptions, impairment of normal judgment, and dissociative changes leading to irrational acts including attempted armed robbery. (Corresponds to *Acute intoxication due to use of hallucinogens* as defined by ICD-10)

b. **309.81 Post-Traumatic Stress Disorder,** due to psychological shock after realizing the ramifications of arrest on 20 Dec 1957 for a felony. Manifested by recurrent violent suicidal fantasies, flashbacks, nightmares, and avoidance of most former relationships as well as new relationships. This disorder began on 21 December 1957 and lasted at least six years, gradually resolving.

c. **311 Depressive Disorder NOS.**

	manifested by loss of energy and ambition, hopelessness, recurrent suicidal plans, social withdrawal, loss of interest in previously pleasurable ac tivities, self-imposed austerity, and feelings of humiliation and worthlessness. This disorder began on 21 December 1957 and improved gradually after his third marriage, but did not resolve until March 1999.
Axis II	No Diagnosis
Axis III	No currently serious medical problems
Axis IV	Stress: Severe - unwitting ingestion of LSD or an LSD-like substance and the sequelae thereof
Axis V	GAF: 85. (GAF from 20 Dec 57 to 15 Mar 99: 10-70.)

5. **Treatment Recommendations:**

None at this time. Mr. Ritchie has recovered from the above disorders.

6. **Prognosis:**

Good. No recurrence is expected.

E. NATURE AND EXTENT OF PERSONAL INJURY:

As consequences of a mental disorder, induced by the covert administration of LSD or an LSD-like substance on December 20, 1957, Wayne Ritchie sustained the following personal injuries:

1. Drug-induced paranoid thinking, depression,

altered perceptions, paranoid ideation, agitation, and illogical thinking., leading to the attempted commission of a felony.

2. Termination of his career as US Deputy Marshal due to disturbed judgment while under the influence of an LSD-like drug, causing him to resign his position immediately.

3. Permanent loss of friendship of coworkers and friends resulting from his conviction and resignation.

4. Permanent condemnation by his father for his presumed criminality.

5. Persistent psychological distress due to sense of humiliation and betrayal of his ideals and all the people who had previously respected him.

6. Recurrent suicidal urges accompanied by guilt and indecision.

7. Symptoms of post-traumatic stress disorder, including nightmares, flashbacks, social withdrawal, and inability to form new romantic relationships.

8. Symptoms of severe depression including social withdrawal, self-imposed austerity• and persistent feelings of futility and worthlessness.

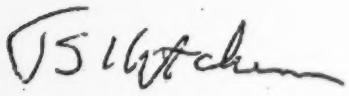
9. Feelings of lack of entitlement to friendship, enjoyment, or church membership.

10. Inability and lack of desire to pursue upward mobility and recognition in any field of professional endeavor.

11. Limitation of quality of life, income, social popularity, and pursuit of previously enjoyed

recreational activities.

Declaration as required by Rule 26 concerning Expert Testimony: This report contains a complete statement of all opinions to be expressed by the undersigned and the reasons therefor: the data or other information considered by the witness in forming my opinions; any exhibits to be used as a summary of or support for the opinions; (see Appendix B) my qualifications (see Addendum 1), and the compensation to be paid for the study and testimony and a list of any cases in which I have testified as an expert or trial or by deposition within the last four years (See Addendum 2)



5 Dec 01

James S. Ketchum, M.D. Date

Appendix A

Further Details of Personal History

(Note: This appendix contains some repetition of facts mentioned in the evaluation)

Family And Developmental History: Mr. Ritchie's parents and grandparents were all born in the United States, of Scotch-Irish, Dutch, and English origins. His nuclear family consisted of his father, who lived to the age of 80, his mother, who died at 97, and two older brothers, Leroy and Russell, seven and three years older respectively, who are still living.

Wayne grew up during the depression, and although the family was somewhat better off than many others in their small town; there was a real shortage of essentials. During his first few years, Wayne's father worked for uncle Sy in the concrete trade, earning $11 a week. He was away in the Cascade mountains for long periods at times; working six to seven days a week building drains and repairing roads.

Wayne's "Uncle" Roy owned a small lunchroom in Tacoma, but had difficulty handling it by himself and persuaded Wayne's parents to help him. When Wayne was six, Roy decided to sell the whole lunchroom to Wayne's father for $1,000, including all the equipment and furnishings. To operate it successfully, mother and father worked in overlapping shifts from 6 A.M. to 2 A.M. a total of 20 hours a day, six days a week. On Sunday, the whole family, including Wayne, would spend the day cleaning the lunchroom.

His father, always an achiever, announced one day that he would gross $60 before he closed shop. He finally reached this goal at 3 A.M. with the help of some sympathetic merchant-marine police who heard about-his marathon effort and persuaded some buddies to come in and buy extra

hamburgers.

The family was well-liked and sometimes hosted picnics, providing food for dozens of friends. Many of Wayne's friendships resulted from these contacts. One Canadian couple, Maynard and Hazel, had two boys, Lyle and Kenny. They lived about 15 miles away and Wayne recalls spending a pleasant two weeks with them one summer.

On work days, his mother packed lunches for everyone and then went off to work in the cannery or to pick fruits or vegetables in the fields around Auburn. Before he began school, Wayne generally went with her, thus becoming closer to her than his older brothers did. He remembers her as always seeming happy, humming as she worked -- a habit that stayed with her for life.

Although his mother was by nature gentle and emotionally supportive, Wayne's father was a serious man who expected nothing but the best from his sons. Neither parent had alcohol or drug problems but his father drank moderately on occasion. He and Wayne's mother were married close to 65 years.

Like his older brother, Wayne joined the Boy Scouts, but only for about four years, but did not give it much time because "my father placed little importance in it." He played some soccer, but not much, because work always came first. While growing up, all three brothers were held to strict standards of behavior. When necessary, which was not often, discipline was administered (mostly to Wayne's older brothers) by their father. Infractions such as failing to do chores, breaking a window, etc., were punished with a strap, but not severely.

Because his father was frequently absent during his early years, Wayne's mother was more likely to supervise Wayne's behavior. He recalls occasional spankings for neglecting his chores. The boys were generally obedient, and felt their parents were fair and consistent. In spite of what sound like onerous tasks, all were content with their lives, and there was little

discord or complaining.

Due to his high standards and expectations, however, Wayne's father was someone "you had to work hard to please", as Wayne describes it. Nevertheless, all three sons indeed did their best to please him. An ambitious work ethic governed the behavior of the entire family and defined the future behavior of the boys. All of them honored the family ideals.

Toward the end of his life, Wayne's father developed senile dementia. Wayne made all the arrangements for his father's care in a convalescent home and moved his mother into a small apartment where she lived to be 97. His father died at 80.

Wayne became a Boy Scout at the age of 12 because of Leroy, who was then a senior Scout leader, and a Life Scout, with more than 10 merit badges. Although he spent four years in the Boy Scouts, Wayne never went beyond the rank of Second Class. His duties at the lunchroom left him little time for such extracurricular activities, and his father did not consider scouting as important as his other responsibilities. Wayne did, however, enjoy a number of hikes and camping trips. He recalls helping some of the smaller kids carry their packs (an early example, perhaps, of a lifelong tendency to help out cheerfully whenever needed.) He still recalls the Scout oath, the 12 principles of Scouting ("A Scout is trustworthy, loyal, helpful, friendly, courteous. kind, obedient, cheerful, thrifty, brave, clean and reverent") and regards scouting as a patriotic activity.

Psychosexual and Marital History: Wayne did not undergo any sexual abuse either as a child or adult. He did not date much during adolescence and early adulthood because of his long work hours. After completing his tour of duty with the Marines, however, he dated more frequently and lived with various girlfriends, but usually not for longer than a few months.

At 24, he and a Venezuelan woman stayed together for 4-5 months and Wayne considered marriage. They had an amicable parting; she even came to his apartment after his arrest, offering to help, but Dorothy's presence made the situation awkward.

His first marriage was to Lorraine Reaves Donnelly, whom he met when a female assistant deputy in his office invited them to dinner, at which Wayne served as chef. Lorraine was divorced at the time and had a five-year old daughter, Judy. Their marriage ended after six months

His marriage to his second wife, Dorothy, took place in 1958 after they had lived together for six months. Even before their marriage, Wayne became aware that she had alcohol problems but thought he could help her overcome them. She was taken into a rehabilitation program in early 1958 but later, after they married, her spree drinking continued. He stuck with her, hoping perhaps for a miracle, until she left him in 1962, as described in the main report. There was, incidentally, no crisis in their relationship prior to the events of 20 Dec 1957. Wayne had not yet given up his hope that she would find help for her drinking.

Education: School was not particularly interesting to Wayne, but he was always punctual "I'd rather be 25 minutes early than one minute late" he comments. He had perfect attendance except when he had the mumps and once when he had an accident. On that occasion he fell from his bike and broke his thumb. He was also briefly knocked unconscious when he flew over the handlebars and "took a header", waking up in the hospital. X-rays showed no fracture and he went home the next day without complications.

He attended high school until just before graduation, but had only average grades, being impatient to reach an age when he could join the Service like his brothers. The only time he got into trouble was once when he was caught smoking. He left school prematurely in his senior year to enlist, but scored so high on the GED exam, that he was subsequently sent a graduation diploma by his high school. He has had no additional formal academic education since that time, other than specialized military training.

Employment History:

When Wayne was only eight, and his head first reached above the counter, he was told that he had "just been served his last meal," and would cook his own food from then on. Given a choice of what to cook, he made a "great big hamburger steak and ate the whole thing," to the amusement of the family. He thought it was a great moment. After that he was always expected to feed himself, except when his mother was available to cook at home, and even then be would be assigned all the related chores before and after meals. His afternoons were spent helping out in the lunchroom, and then, if it was still light outside, he could go and play.

When he was 14 he was put on the family "payroll" by his father, working the "evening" shift" on Fridays and Saturday from 6 P.M. until closing time at 2 A.M. He did this until his 17th birthday in June 1944, when he was allowed to join the Marine Corps.

He spent his first eight weeks as a recruit in San Diego, and then, due to his gun was assigned as arms instructor for the next three months in Oceanside. His next assignment was for six months as a guard in Bremerton, Washington. From June 1946 to February 1947 he worked as an armorer at Pearl Harbor and then again as an arms instructor for the native constabulary on two Pacific Islands. His last assignment was again as an armorer and interior guard on Guam until April 1948, when he was finally assigned as an instructor in small arms weapons

training in San Diego.

Wayne had no disciplinary problems (other than one incident of falling asleep on duty during basic training, for which he was given extra shipboard duties) and he was frequently placed in positions of responsibility normally reserved for more experienced personnel. In 1949, as Corporal, he received an honorable discharge.

Wayne was always able to work with everyone, he says, even with the most recalcitrant co-workers. One was particularly unpleasant and hard to motivate. To show that he could bring out his better side, Wayne talked him into teaming up in assembling weapons with him on the night shift. Amazingly, they were able to turn out 1,000 assembled rifles of which only 30 failed inspection. The next day a team of four men were only able to complete 800, of which 70 had defects.

As soon as lie turned 21, Wayne submitted an application to become a Police Officer, hoping for a career in Civil Service. Unfortunately he ran into a strict inspector who pronounced him ineligible because he was half an inch too short. Very disappointed, he decided to return to work in the Bremerton, Washington, Naval shipyard, where he spent the next month. Because of his leadership ability he was assigned to supervise other workers. "I always could get along with just about everybody," he comments.

While working at an Army Ordnance Depot, he earned a reputation for patience and compassion. When a blind disabled veteran applied for a job assembling rifles, Wayne was chosen by the foreman to try to instruct him. Within a few days he not only succeeded in teaching this man to do the job, but his output equaled or exceeded that of those with normal vision.

In 1952, he applied for a position as a guard at Alcatraz and was hired. He soon found he could get along with even the most dangerous inmates. During an early assignment, rolling a food cart at mealtimes, he actually earned thanks from Robert (Birdman) Stroud by collecting some juice from the canned fruit

desserts for him :"I knew he could kill me in 4 seconds if he got the chance," says Wayne. During this time, his night supervisor (who became his lifelong friend and mentor) was Frank Johnson.

When first hired, Wayne told Lieutenant Rycher he had been trained as an expert in hand-to-hand combat. "You'll have to unlearn some of that," the lieutenant told him. "We aren't allowed to use that kind of force on these men." Instead, gentler techniques such as Judo were encouraged. Wayne was included in the "goon squad," helping to quell riots on two occasions. He was able to handle such uprisings without loss of control. Nothing frightened him much. He recalls once having to subdue an obstreperous inmate unassisted and put him in solitary lockup. He stayed all night in the gun gallery, doing a double shift during which he visited the solitary lock-up facility several times but was subjected to a continuous barrage of obscenities from the prisoner. Although the man apologized to him, the next morning, Wayne resolved that he himself would never use foul language again. "And as far as I know," he says, "I never did."

He feels he always had a "kind of empathy" for the inmates, believing they had enough pain and suffering in their lives as a result of their confinement. He would express interest in their activities when they were in the recreation area. He even went out one night and retrieved about thirty handballs they had accidentally hit over the prison wall, and threw them back into the yard. The next morning he was astonished to be thanked by a prisoner. "I never figured out how he knew I had done that," he says.

Rather than being considered excessively lenient, his gentle approach gained approval from his superiors, who noted that there were rarely any problems when Wayne was on duty. Even his fellow guards, many of whom were much tougher and at times rather mean to the prisoners, seemed not to object to his methods. He had good relations with them all, both on and off

the job.

Another trait that earned him approval was his eagerness to learn and help out. One day (while off duty) he asked to go along when prisoners were transported by boat to San Francisco for court appearances. Later he spent a similar off-duty day taking an active role and learning the procedures required. For his unusual interest in his job, Wayne later received a complimentary letter from the Warden, a form of recognition that other guards said had never been given to any correctional officer in all their years at Alcatraz.

In early 1953, Wayne was chosen from many applicants to become a Deputy US Marshal. His new boss, Frank 0. Bell, the US Marshal, noted his background in firearms, and put him in charge of the weapons cage. To Marshal Bell's surprise, Wayne restored some long neglected "tommy-guns" to nearly new condition. As his excellent performance continued, he was progressively given more challenging assignments. Soon he had earned the trust and friendship of both boss and coworkers. He played golf, bowled, fished, hunted, and joined in weekend parties with them. At one point he was invited to join two lodges, the Elks and The Footprinters, but an FBI friend advised him against it. "They drink a lot, Wayne," he said, "and you don't need that." As he tended to do, Wayne honored the advice of the more experienced officer and decided not to join.

Frank Johnson, after retiring from 30 years of service at Alcatraz, came to visit Wayne in the Marshal's office. When asked whether he was ready to take on the job of working with a partner to transport extremely dangerous prisoners to distant jurisdictions, Wayne replied "Yes, with Frank Johnson as my partner." The partnership was arranged and over the next three-plus years he and Frank traveled hundreds of thousands of miles together by rail, plane and car. Wayne says he felt that when he was with Frank he was under "a sort of a divine protective umbrella." Frank was his role model, as well as his closest lifetime friend. Wayne read the eulogy at his funeral, which

included "Frank was and will be a great inspiration to me. He was understanding, compassionate, helpful and kind to all those he cared for." (This could easily be a description of Wayne as well),

Life after leaving the Marshals: Following his arrest, resignation, trial and conviction, Wayne lost his élan vital, and his self esteem plummeted. He knew he had to work in spite of his despair, but felt entitled to apply only for a relatively unchallenging, low-prestige job as a housepainter. For the next 35 years he never tried to rise above the level of a union painter, and lived a self-imposed life of austerity, He deliberately limited his income, and restricted his activities to his work, and the care of his wife, his adopted daughter, and later on his parents.

In spite of being bitterly condemned by his father for what he considered disgraceful criminal behavior, Wayne invited him to work beside him on many painting jobs, and paid him fairly for his help. W-2 and other records show that his annual union earnings were low, ranging from less than $2,000 to a maximum of $14,000 during his more than 35 years before retirement. Since then he has subsisted primarily on Social Security and a union pension of $302/month.

Temperament and Life Style: For the first 30 years of lus life, prior to his arrest on 20 Dec 1957, an upbeat mood, eagerness to work and acquire new skills, and a constant desire to do the best job possible, were Wayne Ritchie's defining characteristics. After his arrest, however he was suicidally depressed for at least six years. His optimism and self-esteem slowly increased after he dedicated himself to service to the church and other charitable programs. His marriage to Virginia played an important role in this gradual rehabilitation. His realization that he was unwittingly drugged with LSD in 1957, after reading the Gottlieb obituary in 1999, however, had a dramatically positive effect on his mood and brought to him a sense of well-being for the first time in forty-two years.

Since he never had been affluent nor particularly hedonistic, the feeling of redemption did not cause him to change his habits of service or concern for his family. Having always led a rather simple life, he continued to do so. He enjoys visiting his adopted children and their children. Fishing and hunting are only occasional recreations. Wayne's memory remains excellent for his age. He enjoys recalling historical facts, especially names and dates, follows the news and enjoys TV game. shows such as "Jeopardy."

Legal History: Apart from his arrest for attempted armed robbery in December, 1957, Mr. Ritchie has never been charged with any felony or serious misdemeanor. His only citations have been for occasionally exceeding the speed limit. He has never been the target of a lawsuit nor initiated one. He was never subjected to disciplinary action or reprimand during his employment before or after his arrest, nor has he ever been the subject of complaints by neighbors or associates.

Medical and Psychiatric History: There is no family history of heart disease, hypertension, diabetes, mental or neurological illness. His father died of dementia at the *age* of 80. His mother had some type of bone or blood cancer in later years, which remitted after treatment. She then lived to be 97 and died of pneumonia, being mentally clear until the end." Except for the usual childhood illnesses, and a mild heart attack earlier this year, Wayne has had never been seriously ill. He does suffer from moderate obesity, which he is now attempting to remedy through diet and exercise. There is no other history of serious accidents, injuries, or hospitalizations.

At the present time, Wayne sleeps quite well without the help of sedatives or other sleep aids. However, for many years following his conviction, especially the first six, he suffered from severe insomnia, and sleep was often disturbed by nightmares of scenes from 20 December 1957. In addition, he had many intrusive flashbacks which could strike at any time, for example while painting, or walking down the aisle of a supermarket. I've relived that day a thousand times" he says. His sleep has improved gradually in the past few years, especially since March 1999. His appetite has generally been good except for the period following his arrest. His weight at the age of 27 was about 150 pounds, but he has acquired considerable excess weight over the years. Now he is making an effort to reduce with medical advice.

Mr. Ritchie has never been hospitalized for any psychiatric problem, nor has he previously undergone any psychological evaluation, or treatment for mental or emotional problems. He avoided seeking professional psychiatric, psychological, or pastoral counseling after his conviction, not wishing to expose the inner pain and guilt lie carried for so many years. When asked why he did not confide his pain to someone, he says "I was afraid they might reach in and touch it."

Religious History: Religious faith has been a major element in Wayne's life, especially since his return to church life not long after his arrest and resignation from the Marshals in 1957. Asa child he and his brothers were sent to Sunday school, which Wayne enjoyed, and it was here that he earned his Bible by attending the required number of successive Sundays without absences. He remarks, with some . pride, that he still has this Bible, and first learned to pray through Sunday school and church.

Gradually he discontinued active participation in church and religion, as he proceeded through high school and then into the Marines, his work at Alcatraz, and then as a Deputy Marshal. Nevertheless, prayer has remained an important-part

of his life, and he has often felt that God helped him at critical times.

*****

*** Pages 28, 29 and 30 of Report Deliberately Omitted ***

APPENDIX C

Qualifications of the Examiner

A complete CV is provided as part of this appendix, but the following items may be particularly relevant to my qualifications to serve as expert witness in Mr. Ritchie's case:

Education and Professional Certifications: In addition to fulfilling premedical, medical, and psychiatric residency requirements: completion of 30 credit hours in general and abnormal psychology as an undergraduate, two-month elective in hospital adult psychiatry while a medical student, two-month elective in psychiatry during rotating internship. Three-month assignment in neurophysiology during residency training; two year post-doctoral fellowship in neuropsychology (Stanford, 1966-68); Certified in Psychiatry by American Board of Psychiatry and Neurology, Inc. (1971). Licensed to practice medicine in Maryland (1965-1985) and California (1976-present). Licensed to prescribe controlled substances in California (1979-present). Fulfillment of annual CME requirements since 1976.

Adequate contemporary knowledge of general and abnormal psychology, information theory and cybernetics, psychopharmacology (with special emphasis on characteristics and mode of action of alcohol, LSD, marijuana, and other psychoactive drugs), diagnosis and treatment of alcoholism and other forms of substance abuse, human neurophysiology and neuropsychology, general science, and

(since [1998]) human neurochemistry and molecular pharmacology.

Clinical Experience: Psychiatric screening, evaluation and/or treatment of approximately 9,000 adult, child and adolescent patients and research volunteers in various settings for an estimated total of 40,000 direct contact hours, as follows:

1. Treatment of 20 psychiatric in-patients (Bellevue Hospital and Westchester Division of New York Hospital (NYC, 1954-56).

2. Treatment of 25 psychiatric in-patients (Letterman General Hospital, 1956-57).

3. Treatment of 300 adult in-patients and adult and child out-patients at Walter Reed General Hospital (Washington, DC, 1958-60).

4. Interviews of 4,000 enlisted volunteers for drug studies. Administration and observation of effects of psychochemical agents (including LSD) to 800 volunteers Edgewood Arsenal; MD, 1961-71).

5. Interviews of 200 prisoner volunteers and administration and observation of effects of psychochemical agents (Holmesburg Prison, Philadelphia, PA, 1964-66)

6. Crisis therapy with 20 adolescent substance abusers at walk-in Clinic (Bel Air, MD, 1965-66)

7. Crisis therapy with 50 adolescent and adult patients with substance abuser problems including LSD, (Haight-Ashbury Free Clinic, San Francisco, CA, 1967-68).

8. Out-patient psychotherapy with 400 adults (Mental Hygiene Clinic, Martin Army Hospital, Fort Benning, GA, 1973-76)

9. Admission Interviews of 900 patient drug (including LSD) and alcohol patients (UCLA/Brentwood VA Hospital, 1976-79).

10. Treatment of 600 adult and adolescent

in-patients (WoodviewCalabasas, Valley Presbyterian, Northridge, Encino, and Tarzana Hospitals, San Fernando Valley, Los Angeles, CA, 1978-86).

11. Interview and selection of 40 from group of 200 volunteers for study of driving performance following marijua[n]a and/or alcohol (contract-with Department of Justice, Sacramento, 1980-82).

12. Treatment of 30 adult convalescent home patients (Los Angeles, CA, 1979-88)

13. Evaluation and treatment of 800 acute psychiatric in-patients (UCLA/Olive View Hospital, Sylmar, CA, 1986-89).

14. Evaluation and /or treatment of 200 adult out-patients in office-based private practice, 1979-95).

15. Evaluation and treatment of 100 adult out-patients (Center for Family Living, Van Nays, CA, 1989-90). -.

- 16. Evaluation and treatment of 200 adolescent residential patients (Eric Erikson Treatment Center, Tarzana, CA, 1990-92).

17. Chart review and consultation for 1500 adult in-patients as Physician Advisor (Blue Cross Insurance Co., Woodland Hills, CA, 1990-93).

18. Evaluation and treatment of 1,000 child, adolescent and adult psychiatry out-patients at rural mental health clinics (Tehachapi, Mojave and Lake Isabella, CA, 1998-2001).

Teaching Experience: Chief of Behavioral Science Division (Academy of Health Sciences, Fort Sam Houston, TX - 1971-73). Development of training courses in drug abuse treatment for the US Army. Designer and sole instructor in 50-hour course in Psychopharmacology (1972). Project Officer, designer and primary interviewer in videotape series on topics related to drug and alcohol abuse 1972-73) Writer and producer of several educational films relating to the effects

of psychoactive agents, including LSD, based on classified research at Edgewood Arsenal (1961-1966.) Assistant or Associate Professor of Psychiatry for varying periods at UCLA, University of Texas in San Antonio, Baylor University and Emory University (1971-present). Psychiatry preceptor for 40 UCLA senior medical students (six-week full-time clinical assignments) and 20 USC physician assistant senior students (4-week full-time clinical assignments) at Olive View General Hospital, Van Nuys, CA (1986-89) Lecturer and seminar instructor on psychopharmacology and substance abuse topics for medical students, psychiatric residents, academic faculty, practicing physicians, LA district attorneys, and various other professional and semi-professional groups at military installations, universities, and public schools in New York, District of Columbia, Maryland, Texas, Georgia and California (1956-2001.)

Research Experience: Assistant in neurophysiological research (Neuropsychiatry Division, Walter Reed Army Institute of Research, (Oct-Dec 1959.) Classified clinical psychopharmacology research involving experimental design of studies, and administration of various incapacitating agents and antidotes (in-cluding LSD) to more than 900 subjects chosen from more than 5,000 Anny medically screened and selected enlisted volunteers assigned for two-months periods temporary duty to Edgewood Arsenal, MD. Additional similar testing at Holmesburg Prison, Philadelphia, PA, and Dugway Proving Grounds, UT, (1961-1971.)

Assignment as Research Psychiatrist (as Regular Army Captain, USA Medical Corps, 1961-62), Chief, Psychopharmacology Branch (as Major, 1963-65) and Chief of the Clinical Research Department as LTC or COL (1965-66 and 1968-71). Design and principal on-site investigator of effects of alcohol and/or marijuana on driving performance for Department of Justice, Sacramento, California as private practitioner and UCLA faculty member (1980-81). Duties required psychiatric interview and selection of 40-50 young

male volunteers from more than 200 candidates and on-site drug administration and response measurements of 40-50 volunteers (several occasions for each) on CHP high-speed pursuit course in Sacramento. Consultant to Neurobiological Technologies, Inc., Richmond, CA as part of clinical psychopharmacology research project (1990-91.)

Professional Activities and Associations: American Psychiatric Association (member since 1959), New York Academy of Sciences (1963-present), American Association forthe Advancement of Science (1970-present), Member, Research Society of America (1964-75), Member, UCLA/Brentwood Research Committee (1977-79). Examiner, American Board of Psychiatry and Neurology Certification Examination (1980); Chairman, VA Board of Inquiry (1979); Member, Advisory Board for NORML (National Organization for Reform of Marijuana Laws) 1978-80, Chairman, Research Committee, Woodview Calabasas Hospital, Calabasas, CA (1984-86); Chairman, New Directions Committee (Arnold Mandell Defense Fund, 1980); Member, American Society of Addiction Medicine (1980-1999), Member and candidate for certification, American Society of Clinical Psychopharmacology (1998-present.)

Professional Publications: Numerous classified technical reports relating to LSD and other potential incapacitating agents - 1961-71. Preparation of comprehensive 5-year summary of US Military Psychochemical Research for Annual Quadripartite Conference (US, UK, Canadian, and Australian Chemical Research Panel - 1965). Other unclassified, peer-reviewed, reports published in major psychopharmacological journals, as well as published letters, book reviews, subscription newsletters, Internet web sites, and book chapters. elating to LSD, alcohol, and other psychoactive drugs (1967-99). I have also participated in, recorded, filmed, produced, edited and/or narrated a number of films and educational videotapes and teaching slides and exhibits (1956-1992.)

Professional Relationships and Exchange of Information: Research collaboration, co-authorship, conference and seminar participation, teaching collaboration, sharing of government documents, and/or close personal acquaintance with numerous experts in the field of LSD psychopharmacology, including: Harold Abramson, Leo Abood, George Aghajanian, Roger Brimblecombe, Kenneth Blum, Malcolm Bowers, Enoch Callaway, Ernest Clovis, Sidney Cohen, Herman Denber, Daniel Freedman, Samuel Gershon, Lester Grinspoon, Murray Jarvik, Alexander Shulgin. Milton Greenblatt, Leo Hollister. Van Sim, David E. Smith, Solomon Snyder, J. Thomas Ungerleider, Louis Jolyon West, and Harold Wolff.

Invited Participant or Consultant Activity: Invited speaker at NATO conference on Chemical Weapons Defense (SHAPE headquarters, Paris, 1962); participant at international conference on "The Use of LSD in Alcoholism and Psychotherapy" (Editor: Harold Abramson, 1965). Committee member on The Future of Incapacitating Agents at a RAND sponsored conference in San Diego (1965). Invited 14-day visit as consultant to the British Army Chemical Research Establishment at Porton Downs, England, (April, 1965.) Consultant at Edgewood Arsenal on several occasions to the CIA, regarding covert use of psychochemicals against enemy leaders (1964-66). Invited to join the CIA (1972). Panel member on Weapons of Chemical. Warfare, Vandenburg Air Force Base (1971); Consultant, author of 30-page summary report of Edgewood Arsenal volunteer drug research for Special Committee on Anticholinergics, National Research Council, National Academy of Sciences (1983-84) Panel member and section leader, Conference on Defense Against Chemical Weapons by Terrorists, Aberdeen Proving Grounds, MD. (Chairman: Leo Abood, 1986).

Medicolegal Experience: Psychiatric examinations of 60 individuals for Los Angeles County and various private insurance companies (1980-94). Deposition or testimony as

expert witness on 10-15 occasions (1984-88). Expert witness in civil suits on two occasions: Superior Court in Los Angeles (1987, 1991).

Media Involvement: Scientology interview regarding military research with BZ and LSD (1979). Filmed interview regarding US Army chemical warfare research (Sylvia Chase, 20/20 television program, 1980). Filmed interview describing US Army position on LSD research for British documentary TV program "First Thursday" (1991). Filmed interview for follow-up TV presentation by Canadian Television (1991). Consultant to Alan Brovar, investigative reporter for Philadelphia Police Department, author of "Acres of Skin", a book about research with prisoner volunteers (1997). National Public Radio interview regarding Brovar's Book (1998); author of review article on Incapacitating Agents, for Jane's Defense web site: http://onlinejanes.com (1999).

Awards and Special Recognition: Elementary school valedictorian (PS 144, Queens, NY, 1944). Academically first-ranked male student in senior class of 430, recipient of Phi Beta Kappa Award for top male graduate, and Mathematics Gold Medal for best math student (Forest Hills High School, New York, 1948). Winner, Four-year State scholarship (New York, 1948).. Scholarship offers from Yale, Princeton, and Dartmouth (1948). Youngest freshman and only one in class of 730 to obtain straight A's during first semester at Dartmouth College. Winner (6th highest in New York City), New York State Medical Scholarship (1952).

First Regular Army psychiatrist assigned to work for Army Materiel Command, Top Secret Clearance (Edgewood Arsenal, 1961). Winner, best paper on pharmacology (US Army Munitions Command, 1972). Legion of Merit (1976). Merit salary increase (UCLA/Brentwood/ VA Hospital, 1978). Invited lecturer (UCLA colloquium on "Endorphin Research in Psychiatry", 1979) Apple of Excellence Award for Best Mental Health Professional (Tehachapi, CA, 1998). Certificate of Appreciation (Kern County Chapter, Southern California

Psychiatric Association, Bakersfield, CA. 2001)

Other activities and further details of above are presented in attached Curriculum Vitae (Appendix E).

Addendum 1. Personal research and experience relating to LSD

My own work with LSD began in 1961 and ended in 1965, all of it conducted under the auspices of the Medical Research Laboratories at Edgewood Arsenal, MD. I had the opportunity to plan the studies and personally observe almost 100 subjects. They were all Army volunteers, recruited equally from all six Army areas of the United States. Selection on the Post level was based initially on a medical and psychological screening (using the MMPI, after completion of an extensive hand-written personal and medical history.) This was preceded by a one-hour verbal briefing by two of our medical officers from the Edgewood Program and the showing of an informative documentary film describing and displaying the nature of the laboratory and volunteer program.

Upon their initial selection (based on MMPI and personal history results) subjects were temporarily assigned to Edgewood Arsenal for 30-60 days where they were housed in a separate barracks and given light duty assignments between tests. They were then further screened: a complete medical exam, EKG, and a comprehensive battery of laboratory studies as well as a psychiatric interview for those judged most physically and psychologically suitable for participation in psychoactive drug studies.

Only those who were considered by the psychiatrist to be most stable and appropriately motivated to undergo such testing were permitted to receive the more potent chemical agents such as LSD. We generally excluded those who simply wanted to "beat the test" or "find out what the Army was up to", as well as those with significant histories of problems with drugs or

alcohol, previous disciplinary problems, or prior exposure to LSD or to other psychedelic compounds.

In contrast to what some other investigators have observed (under other conditions, designed to explore therapeutic, aesthetic, or spiritual aspects of the drug) only a minority of our subjects at Edgewood Arsenal spontaneously reported glorious colors and thrilling alterations in space and time that Anais Nin, Alan Watts, Aldous Huxley, Cary Grant and other articulate writers have written about. This, incidentally, is true for other populations including patients and average individuals studied by other investigators.

As Keith Ditman remarked at a 1965 conference on LSD, an analysis of the 18 most commonly mentioned symptoms reported by patients undergoing the drug experience showed that visual hallucinations were the least often mentioned, being recalled by fewer than 20% of them. Mood changes, especially euphoria or depression. and paranoid ideation were most commonly reported. One of our subjects admitted that while his companions were having a Disneyland type trip, he felt like "I was a little acorn and the whole world was coming down on me, while the rest of you were laughing it up." Such depression and paranoia obviously were transient but not uncommon in our studies.

As a personal illustration of how the interests of the subject influences the content of their experience, on the one occasion when I took LSD in our laboratory under the same conditions as the volunteers, I visualized my nerve cells in the brain transmitting chemically to each other, since the neuropharmacological mechanism of LSD was on my mind at the time. I did not see lights or feel a distinct space and lime warp (although I did have some anxiety at one point and squeezed the hand of my nurse companion for reassurance.)

So much for the effects of LSD in those who know they have been given the drug. As to the effects in unwitting subjects, less has been publicly documented, although some

information came forth as a result of congressional hearings in the late 1970's. Investigators have agreed almost unanimously that the practice is potentially dangerous. Further, almost all strongly recommend that a qualified mental health professional be present. A comfortable environment with a reassuring companion close at hand is very helpful. In Mr. Ritchie's case these were not provided.

While at Edgewood, I learned something of the consequences of covert LSD administration, from conversations with Van Sim, my predecessor in the LSD research program. He described the effects produced by a small amount of LSD placed in the drinks of officers at Happy Hour. These studies were not entirely covert in that subjects had given general consent previously. It is interesting that during the late 1950's it was expected that Chemical Corps officers in training at Ft. McClellan take LSD on a day when they were scheduled to go through ordinary class activities, as a kind of "familiarization" with the potential effects of incapacitating agents. Not everyone enjoyed it. Some who took it found it frustrating trying to attend lectures or play volleyball as part of fitness training.

General Lloyd Fellenz (Commanding Officer of Edgewood Arsenal in 1961) and another Chemical Corps officer separately confided to me how frightening it had been when they were slipped some LSD in their morning coffee. In each case, these officers were able to guess what had happened since they had previously agreed verbally to covert dosage without prior warning and knew what to expect. Nevertheless they were both angry when it occurred while they were on duty. General Fellenz was supposed to supervise field exercises and when symptoms began that morning and he had a hunch he had been dosed. he confirmed it by noticing Dr. Sim walking along the road some distance behind him. Incidentally, somehow the Commanding General made it through the day, but some effects persisted into the evening.

I did not feel it proper to do covert testing and have always

been sure that none was done while I was at Edgewood. Nevertheless, with or without general prior consent, it appears from documents I have recently read relating to MK-ULTRA that such activities may have continued without my knowledge, through private arrangements between the CIA and Drs. Sim and Major Ernest Clovis (a psychologist) who together conducted LSD tests prior to my arrival. I was also quite surprised to read a memo concerning a meeting between these parties and a CIA official in 1963 resulting in a memo agreement to halt all further testing with LSD at Edgewood. Testing within the Clinical Research Division continued until 1965 without objection, however, suggesting some lack of communication and coordination. In 1964-65 I conferred on occasion With CIA representatives who visited the laboratory. Our discussions involved the practicality of using various incapacitating agents in various situations, including the .hostage crisis in Israel around that time.

Personally. I attribute the benign reputation of the testing program to the special precautions and considerate treatment provided by the Edgewood staff. Not only the selection process but the thorough screening after selection, along with the extensive psychological preparation and "baseline" performance and physiological measures employed, were conducive to confidence and trust among the subjects. Additionally, each volunteer was observed for a period of at least two weeks following exposure to any compound, and was given at least two days to become familiar with the test environment and medical personnel prior to any drug administration. They were also kept under constant medical observation until full recovery had occurred.

The definition of informed consent has always been a matter of controversy, and the requirements have become increasingly stringent in the past few decades. At Edgewood, we were especially sensitive to the potential for future criticism in this regard and our procedures were always consistent with existing guidelines, which included the Nuremberg and, after

1964, also the Helsinki guidelines for human experimentation.

In addition to general written consent forms, signed at the time of assignment and more specific consent forms signed prior to each test, verbal explanations were given within the limitations imposed by official security constraints as well as the need to avoid response bias. This meant that the names of the compounds were not given, both for security reasons (as stated) and because prior published information, media opinions, and street folklore (e.g. in relation to drugs such as LSD) were often misleading and could become confounding variables. Motivation might be influenced and drug responses altered based on pre-existing expectations.

Contemporaneous published studies suggest that the degree to which our subjects were informed, prepared, documented, and subsequently followed up in our program was at least as extensive, and in most cases more extensive, than at many prestigious universities where drugs such as LSD were studied in the 1960's. Details of these protections have been described in publications from our laboratories, which are all available in the professional journals as well as in previously classified government reports (some of which are listed in Appendix B).

Extensive follow-up evaluations of long-term effects of our LSD and BZ studies (by the Walter Reed Army Institute of Research and the National Academy of Sciences respectively) failed to find any significant long-term adverse consequences in terms of either mortality or morbidity rates. This stands in contrast to what happened to individuals who received LSD unwittingly as in the case of Frank Olson and Wayne Ritchie.

Addendum 2: Information Required by Rule 26.

The above report contains a complete statement of all the opinions and basis and reasons therefore; the data and information considered, any exhibits to be used as support for or

a summary of the opinions, by qualifications and publications, I have authored in the past ten years. The compensation I am receiving for my review and testimony is at follows:

Completion of psychiatric evaluation and delivery of final report: a flat fee of $5,000, of which $4,000 has already been paid.

Review of records, telephone discussion, review of research publications: $100/hr. Time spent in actual deposition: $250/hr (to be paid by defendant).

Time spent in preparation for deposition: $150/hr. (i.e. in direct contact with Mr. Bender.)

Time spent composing and editing report in reply to defendant's expert: $150/hr. Time spent in courtroom testimony: $500/hr.

Travel, meals, lodging, reasonable incidental costs associated with my deposition (except those paid by the defense) and trial appearances (to be paid by plaintiff as invoiced).

* * * * * *

The only deposition or trial at which I have testified in the past 4 years is as follows:

Christophersen vs. Lynch, Superior Court Case No. 240046-SPC, County of Kern, Deposition taken on 2-21-01.

/s/_____ 5 Dec 2001

James S. Ketchum, M.D. Date

APPENDIX D – CURRICULUM VITAE

The attached copy of my curriculum vitae consists of both a one-page summary and a more complete CV which includes full listings of formal education, teaching activities, publications, etc. I certify that the contents are complete and accurate to the best of my knowledge and recollection.

5 Dec 01

/s/ _____ _____

James S. Ketchum, M.D. Date

SUMMARY CV (as of December, 2001) – Single Page

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James S. Ketchum, MD
Curriculum Vitae (Summary)

Identifying Information
Sunnyslope St.
Tehachapi, CA 93561
(Mailing address: PO Box 692, Tehachapi, CA 93581)
Tel: 805/822-8079 (Home/Office) Fax: 805/822-3146
Cell Phone 661/203-2240 E-Mail: ndorfun@aol.com
DOB: 1 Nov 1931 Citizenship: USA
SSN: 003-22-3280 Occupation: Psychiatrist

Education

Undergraduate:

High School: Forest Hills, Queens, NY (Sep. 44-Jun 48)
College: Dartmouth College, Hanover NH (Sep 48-Jan 51)
Columbia College, NYC, NY (Feb. 51-Jun 52)

Graduate:

Medical Education (Sep 52-Jun 56)
Cornell University Medical College, NYC, NY
Rotating Internship (Jul 56-Jun 57)
Letterman General Hospital, San Francisco, CA
Army Career Officer Training (Jul-Dec 57)
Medical Field Service School, San Antonio, TX
Residency in Psychiatry (Jan 58-Dec 60)
Walter Reed General Hospital, Washington, DC
Fellowship – Neuropsychology (Oct 66-Sep 68)
Stanford University, Palo Alto, CA

Professional Experience

Military Psychiatry Assignments (US Army):

Internship (rotating)
Letterman Army Hospital, DC (Jan 58-Dec 60)
Resident, Psychiatry
Walter Reed Army Hospital, DC (Jan 58-Dec 60)
Research Psychopharmacologist
Edgewood Arsenal, MD (Oct 68-Jun 71)
Chief, Behavioral Science Division
Ft. Sam Houston, TX (Jun 71-Sep 73)
Chief, Psychiatry Department
Ft. Benning, GA (Oct 73-Aug 76)
Retirement as Colonel, Regular Army (30 Sep 76)
Legion of Merit

VA and County Psychiatry

Chief, VA Substance Abuse Program, **UCLA/Brentwood** (1976-79)

Ward Psychiatrist, **UCLA/Olive View Medical Center** (1986-89)
Psychiatrist, Center for Family Living, **Van Nuys, CA** (1989-90)
Psychiatrist, Erikson Adolescent Center, **Tarzana, CA** (1990-92)
Psychiatrist, Desert Counseling Center, **Tehachapi, CA** (Feb-Jun 1998)
Psychiatrist, College Health Clinics, **Mojave, CA** (Jul 1998-Jun 2001)

Private Practice of Psychiatry

Solo practice, Encino, CA (1979-81)
Group practice, Encino, CA (1981-82)
Solo Practice, Westlake, CA (1982-84)
Solo Practice, Woodland Hills, CA (1984-95)
Solo Practice, Tehachapi, CA (1995-present)

Consultant Contracts

Psychopharmacology Consultant
Department of Justice, Sacramento (1979-82)
Review of Military Research – Anticholinergic Agents
National Academy of Sciences, Wash. D.C. (9180-82)
Medical Advisor
Blue Cross Insurance Co., Woodlands Hills (1990-93)
Psychopharmacology Consultant
Neurobiological Technologies, Inc. (1992-94)
Independent Evaluations
California State Disability Exams (1980-82)
Workers' Compensation Exams (1991-93)
Private Insurance Companies, Attorneys (1980-2001)

Academic Activities

University Appointments

Assistant Clinical Professor of Psychiatry
Emory University, GA (1971-73)
UCLA, CA (1976-01) [In Residence 1976-79]
Associate Clinical Professor of Psychiatry
Baylor University, TX (1971-73)
University of Texas Medical School, TX (9172-73)

Selected Publications

Ketchum, JS: *The human assessment of BZ* **CRDL Technical Memorandum No. 20-29**. US Army Report, 1963.

Crowell EB Jr., Ketchum JS: *The treatment of scopolamine-induced delirium with physostigmine*. **Clin. Pharm and Ther** 8:409-414, 1967

Ketchum, JS, Shiner P, Gutterman L, Kysor PK: *The prediction of individual military performances from laboratory measures of performance in volunteers exposed to incapacitating agents*. **Proceedings of the Sixteenth Conference on the Design of Experiments in Army Research, Development, and Testing.**

Fort Lee, Virginia, 1970 US Army Report

Ketchum JS, Sidell FR, Crowell EB Jr, Aghajanian GK, Hayes AH Jr.: *Atrophine, scopolamine and ditran: comparative pharmacology and antagonists in man*, **Psychopharmacologia**. 2:140-165, 1973.

Ketchum JS: *Treatment of anticholinesterase poisoning*. In Ballinger and Brechner VL (eds.) Endocrines and Enzymes in Anesthesiology. Springield, Illinois. Charles C. Thomas, pp 208-217, 1973

Ketchum JS, Jarvik M: *Pharmacotherapy for the opioid addict: agonists of antagonists*? **Rational Drug Therapy** 13:1-5, Jan 1979

Ketchum JS, Ungerleider JT: *Substance Abuse*: in Freedman et al. (eds), **The Mosaic of Contemporary Psychiatry**, McGraw Hill, New York, NY, 1991

Ketchum JS, Sidell FR: *Incapacitating Agents*. Chapter 15. From **Medical Aspects of Chemical and Biological Warfare. Textbook of Military Medicine.**

Editors: Sajtchum R. Bellamy RF. Published by the Office of the Surgeon General, Washington, DC, July 1997.

Professional Memberships

American Psychiatric Association, New York Academy of Science, American Medical Association, Southern California Psychiatric Association, American Society of Addiction Medicine, Research Society of America, Kern County Psychiatry Chapter, CA, American Society of Clinical Psychopharmacology (candidate for certification 1999).

Hospital Affiliations

Woodview-Calabasas Psychiatric Hospital, Encino Hospital, Holy Cross Hospital, Valley Presbyterian Hospital, Tarzana Hospital, Northridge Hospital (Los Angeles, CA). Various periods (1979-93)

Licensure and Accreditation

Board Certified in Psychiatry: Oct 1971

California Medical License: **G033189** – Expiration Nov 2003

DEA License: **AK 7286140** – Expiration Dece 2004

Continuing Medical Education

As required by American Psychiatric Association

(CV updated: December 2001)

FOREIGN AND MILITARY INTELLIGENCE

FINAL REPORT

OF THE

SELECT COMMITTEE

TO STUDY GOVERNMENTAL OPERATIONS

WITH RESPECT TO

INTELLIGENCE ACTIVITIES

UNITED STATES SENATE

TOGETHER WITH

ADDITIONAL SUPPLEMENTAL AND SEPARATE VIEWS

April 26, 1976

PLAINTIFF'S EXH 44

399

3. The Surreptitious Administration of LSD to Unwitting Non-Volunteer Human Subjects by the CIA After the Death of Dr. Olson.

The death of Dr. Olson could be viewed, as some argued at the time, as a tragic accident, one of the risks inherent in the testing of new substances. It might be argued that LSD was thought to be benign. After the death of Dr. Olson, the dangers of the surreptitious administration of LSD were clear, yet the CIA continued or initiated a project involving the surreptitious administration of LSD to non-volunteer human subjects. This program exposed numerous individuals in the United States to the risk of death or serious injury without their informed consent, without medical supervision, and without necessary follow-up to determine, without medical supervision, and without necessary follow-up to determine any long-term effects.

xxx 403

From its beginning in the early 1950's until its termination in 1963, the program of surreptitious administration of LSD to unwitting non-volunteer human subjects demonstrates a failure of he CIA's leadership to pay adequate attention to the rights of individuals and to provide effective guidance to CIA employees. Though it was known that the testing was dangerous, the lives of subjects were placed in jeopardy and their rights were ignored during the ten years of testing which followed Dr. Olson's death. Although it was clear that the laws of the United States were being violated, the testing continued. While the individuals involved in the Olson experiment were admonished by the Director, at the same time they were also told that they were not being reprimanded and that their "bad judgment" would not be made part of their personnel records. When the covert testing project was terminated in 1963, none of the individuals involved were subject to any disciplinary action.

DESIGNATIONS FROM DEPOSITIONS FOR TRIAL

MANY PAGES OF THE DEPOSITION OF IRA FELDMAN INTRODUCED AT TRIAL ARE NOT REPRODUCED HERE. THE KEY PAGES 347,428-438 ARE REPRODUCED HERE

IRA FELDMAN'S DEPOSITION
ON FEBRUARY 7, 2003

347

Q. The language is very simple. You use simple language.

"I would give these drugs to certain people."

You are talking about yourself, right?

A. What do you want to know?

Q. You gave the drugs, LSD, to certain people, didn't you?

A. To certain people I did.

IRA FELDMAN'S DEPOSITION ON FEBRUARY 7, 2003

428

Q. Now, all these people that **you personally drugged**, you never did any follow-up on them, in the sense of telling them **that you had drugged them**, did you?

* * *

A. Not all the people that **I drugged.** I drugged guys involved in about ten, twelve, period. I didn't do any follow-up, period, because it wasn't a very good thing to go and say "How do you feel today?". You don't give them a tip. You just back away and let them worry, like this nitwit, Ritchie.

Q. When you say "let them worry", you mean let them have a head full of LSD…

A. Let them have a full head [of LSD] like what happened, like what happened with this nut [Ritchie] when he got out and got drunk.

429

Q. And did you understand the extent of the suffering that these people, these ten or twelve people, that you had given LSD to – the extent of the suffering that they would encounter as a result of being administered the LSD by you?

A. I did not, because none of them were suffering.

* * *

4-30

Q. Well, if people saw snakes coming out of the wall, do you think they were suffering?

A. If people saw snakes coming out of the wall and that stopped another Pearl Harbor from getting Americans killed, it was worth it. They could suffer their brains out. That's the way I feel about it. If it was doing good with the country, the hell with the people with the snakes. I love this country, period. I got medals to prove it. I'm a good citizen, and I piss on these guys that are suffering. They would suffer so much so we wouldn't have trouble like we have today. Now, what more do you want to know?

* * *

Q. (continuing) When you gave them LSD, you decided that the person that you chose would suffer?

* * *

431

A. No. I didn't decide.

Q. Who decided it?

A. Nobody.

432

Q. Who decided to give that particular person that you gave LSD to LSD? That was you?

A. Sidney Gottlieb. He said, "Get that guy. Get this guy. Ray, get this guy."

I didn't pick out anybody. I don't know what the hell he wanted these people for.

Q. So that every time that you gave somebody LSD, Sidney Gottlieb was along?

A. No, he wasn't along. But he most likely knew these people. He said, "Hey, Joe, the guy in the bar, give him some LSD." And he didn't say "LSD." He said, "Give them a dose. Give them a belt. Give them something. And let George know what's happening. "George" was White. When it was done, and I got a report, I wrote it up and gave it to White, and I have no idea what White did with that report.

433

Q. So each and every time that you gave somebody LSD you were following orders to give that particular person LSD?

A. Absolutely. I didn't pick out anybody. I didn't pick out a soul.

Q. So you just followed the order of either Gottlieb, Treichler or White?

A. Right.

Q. And that's what you did?

A. That's what I did.

Q. And whoever they chose, that's the person you gave it to?

A. That's the way it was done.

* * *

434

Q. ... But that's all you did was follow orders, is that right?

A. No. I didn't follow orders all the time.

Q. Did you ever say "I'm not going to give LSD to that person"?

A. I didn't say that. I said "Not this guy, not her," period. I was very, very choosey, period.

Q. So you negotiated with --

A. I negotiated. I more or less moved the chips a little bit.

Q. And in talking to Gottlieb, "Not this person. How about this person"?

A. Possibly. Possibly. Possibly.

Q. And you negotiated with Ray Treichler: "Maybe not this person. Let's do it to this person"?

A. Possibly. Possibly.

Q. So you have a distinct recollection of doing that negotiation?

A. Oh, absolutely I have a recollection.

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435

Q. And you negotiated with White and you said "Maybe not this guy. Let's do it to this guy"?

A. Same thing, right. Absolutely.

Q. So you were in on the decision process.

A. Of course I was in on the decision process.

Q. So you were essentially deciding who was going to suffer and who was not going to suffer.

A. I didn't say anybody had suffered. I didn't say anybody suffered. The bird, like this guy [Ritchie], who saw snakes coming out, he deserved to suffer. He [Ritchie] had eight

FELDMAN

435

or ten drinks and then goes out and gets a couple of guns and tries to hold up someone. And then he waits.

MS. KENNEY: Mr. Feldman

MR. BENDER: He is answering the question. I object to your doing that at a critical time like this. You have some nerve to interrupt that witness now. That's horrible.

436

MS. KENNEY: He appears to be spacing out.

MR. BENDER: He is not spacing out. You may be spacing out because of the testimony he is giving.

MS. KENNEY: The video will show.

MR. BENDER: It sure will.

MS. KENNEY: Go ahead.

MR. BENDER: Will you pick up where he left off?

Will you read it to him?

MS. KENNEY: We have been sitting here since _ _

MR. BENDER: We are in the middle of an answer.

MS. KENNEY: We have been sitting here since 1 o'clock this afternoon. At a convenient time we will take a break.

MR. BENDER: We had a break.

MS. KENNEY: You tell me when it is convenient. But sometime between now and 4:00.

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MR. BENDER: Who do you think you are, to interrupt this witness like that at a critical time? You know what you are doing.

FELDMAN

MS. KENNEY: Excuse me. I don't agree with you that it is at a critical time.

MR. BENDER: You know. That is why you did it.

MS. KENNEY: I don't agree with you.

MR. BENDER: Of course you don't.

MS. KENNEY: Do you want the reporter to read it back?

MR. BENDER: Please give him his answer as he is giving it.

(Record read)

BY MR. BENDER.

Q. Do you want it to continue?

A. No. That's it. That's all I remember.

Q. Can you give us some instances when you were working with White, about who

438

should be drugged?

A. No. I couldn't give you any instances at all.

MR. BENDER: Okay. Let's take a break.

445

A. . . . One woman I know ended up in the hospital. They become suicidal. . . .

CAPTION

McLean, Virginia
Saturday, July 27, 2002

Deposition of
FRANK H. LAUBINGER

A witness, called for examination by counsel for Plaintiff pursuant to notice and agreement of counsel

* * *

42

Q. (Bender) Let's go on to one that's a little clearer. How did you utilize George White's diary to find victims?

A. Reviewed it very, very carefully page by page and as we saw something that we could identify at all, give any clues, we followed them up and tried to make contact

* * *

243

Q. After you saw that entry in the George White diary for December 20, 1957, if

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you found out that a deputy U.S. Marshal who attended that party left the party and thereafter went to his locker, got both of his guns and then proceeded to a bar and held up that bar, would you have investigated that bizarre behavior and that incident?

A. I certainly think we would have.

LEVENTRITT LEWITTES & BENDER

April 13, 2005

Owen P. Martikan, AUSA
The U.S. Attorney's Office, Civil Division
Re: Ritchie v. USA-C00-3940
Dear Owen:

This is to confirm our conversation today that your April 8th motion raised two issues for dismissal as a matter of law (TR668) and that your papers to be submitted on Monday April 18th will not brief point 1:

1. the standard under Daubert for the reliability of expert testimony and
2. the lack of any evidence on which any reasonable juror could find causation.

Accordingly, you stated that your motion papers will be confined only to point 2 above.

Very truly yours,

/s/Sidney Bender

CAPTION
DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
Original Filed Nov. 7, 2003

I. Testimony Evidence

In the sworn testimony of Ira Feldman in a declaration and two-deposition sessions taken seven months apart, there are inconsistencies, some of which can be easily explained. It is true that during the second day of deposition, Feldman who at his first deposition denied knowing about LSD and denied giving it to anyone, changed his testimony and vaguely claimed he had been involved in giving LSD, but did not say when during his 8 or 9 years in the San Francisco office of the Federal Bureau of Narcotics from 1955 until sometimes in 1963 that he did so. *See generally* 1st Feldman Depo and at 6 (1955); 2nd Feldman Depo and at 335 (1963 or 1964).

Significantly, a review of the second Feldman deposition shows that plaintiff's counsel never tried to establish when it was that Feldman who now claims that he was involved in giving LSD did so. Plaintiff's counsel also did not ask Feldman directly during the second day of his deposition whether Feldman gave or caused to be given LSD to plaintiff. 2nd Feldman Depo.

xxx

As explained, below, the key portions of Mr. Feldman's testimony are uncontradicted: Mr. Feldman does not remember Mr. Ritchie; he did not attend Christmas parties, including the one in December of 1957; . . . Mr. Feldman was never in the press room at the Post Office; Mr. Feldman did not slip plaintiff LSD; . . .

A. Declaration of Ira C. Feldman, filed on March 2, 2002.

Mr. Feldman has repeatedly testified that he does not remember plaintiff from when plaintiff was a Deputy

United States Marshal and that he has no knowledge of anyone drugging plaintiff at a Christmas Party on December 20, 1957. Specifically, in a declaration, Mr. Feldman testified:

> Based on the Complaint that plaintiff Wayne A. Ritchie filed, I understand that plaintiff alleges that he attended a Christmas party in the United States Post Office Building at Seventh and Mission on December 20, 1957 and alleges that he believes some unidentified person may have drugged his food or drink.

Declaration of Ira C. Feldman ("Feldman Decl."), filed on March 2, 2002, ¶3. Mr. Feldman went on to testify:

> I do not recognize plaintiff's name. I do not recall knowing anyone by the name of Wayne A. Ritchie. Although the Courts, the Office of the United States Attorney and the United States Marshal were located at the United States Post Office Building at Seventh and Mission, I worked in a different building. I never attended any Christmas parties which were held in the United States Post Office Building. I have no knowledge about anyone allegedly being drugged at a Christmas party on December 20, 1957. I have no reason to believe that anyone associated with the Federal Bureau of Narcotics drugged anyone at a Christmas party anytime.

Feldman Decl., ¶4.

B. Deposition of Mr. Feldman, taken on July 30, 2002.

As documented below, during the first day of his deposition, Mr. Feldman testified that he did not know plaintiff . . . Mr. Feldman testified that he had never been in the Press Room at the Post Office where plaintiff claims the

December 20, 1957 Christmas party took place; that he did not attend any Christmas parties; that he specifically did not attend the Christmas party on December 20, 1957 where Mr. Ritchie claims he was slipped LSD. . . .

1. Mr. Feldman does not recall knowing plaintiff.

Specifically, Mr. Feldman repeatedly testified that he did not know plaintiff:

> Q. [Mr. Bender]: Now, did you remember a Deputy U.S. Marshal by the name of Wayne Ritchie?
>
> A. [Mr. Feldman]: Never, never, never. I never – if he walked in here now, I wouldn't know him.

Deposition of Ira Feldman ("1st Feldman Depo"), taken on July 30, 2002, at 167.

xxx

2. Mr. Feldman did not attend Christmas parties, Including the one on December 20, 1957.

xxx

> Q. And how about in the year 1957, December of 1957?
>
> A. What about it?
>
> Q. Did you ever attend a holiday party over at the Post Office building?
>
> A. No, I didn't.

xxx

6. Mr. Feldman was never even in the Press Room where plaintiff Claims the Christmas party on December 20, 1957 took place.

Mr. Feldman had not been in the press room:

> Q. Now, you were not located in the Post Office building, is that correct? You were located in the Federal building?

A. We were all in the Federal building, right?

xxx

Q. Did you know where the press room was in the Post Office building?

A. I know it was upstairs, near the Judges' quarters, where they used to have their restaurant.

Q. And what usually occurred in the press room? Was that for press conferences?

A. I don't know. I was never there. I never was there.

Q. You were never in that room?

A. Never in that room.

Q. Were there parties in the press room at all during the course of the year?

A. I don't know. I wasn't interested, and I didn't find out, and I didn't inquire about it. No, I never knew.

xxx

1st Feldman Depo at 234-37. . . .

7. Mr. Feldman did not remember reading a newspaper Article at the time about plaintiff . . .

xxx

Mr. Feldman initially testified:

Q.[Mr. Bender] The article is dated Sunday, December 22, 1957, from the San Francisco Call Chronicle, and it is entitled "Good Guy Fails as Bad Guy." (Pause.)

My first question to you about that article is, did you ever see that article before?

A. Never.

xxx

1st Feldman Depo at 232-233.

C. Second Deposition of Ira Feldman, taken February 7, 2003.

During the second day of the deposition of Mr. Feldman, plaintiff's counsel was examining Mr. Feldman about a statement made in an interview for Spin Magazine in 1994 in which Mr. Feldman was quoted as saying that he gave LSD and that some people acted "like jackasses." Feldman Depo at 345-46. The following interchange took place in which Mr. Feldman made it clear that he did not know plaintiff and had never heard of him until Mr. Feldman was contacted in connection with the current lawsuit. Nothing to which Mr. Feldman subsequently testified on the second day contradicts his denial of any knowledge about plaintiff:

> Q. [Mr. Bender] . . But I'm talking about your experience when you said "it made people act like jackasses."
>
> A. [Mr. Feldman]: Yes. When they fell down, when they spit all over themselves, yes they are jackasses. Normal people don't act that way.
>
> Q. Did you ever hear somebody refer to it as provoking erratic behavior?
>
> A. No.
>
> Q. If somebody acted like a jackass, would that be erratic behavior?
>
> A. It depends on what Webster says. I don't know what it is.
>
> Q. And how about if somebody went out and held up a bar? This would be erratic behavior, wouldn't it?
>
> A. No. That would just be a drunken bum.
>
> Q. Or it would be a jackass?

A. No. It would be a jackass. He would be a U.S. Marshal that got drunk and fell on his ass. That's what he would do.
Q. I see.
A. He doesn't come under this cover here.
Q. I see. You remember the situation?
A. No. I don't remember that situation. But this last two or three years it has all been your clients that got drunk. I don't remember the situation. I wasn't even there, period. Nobody I knew was there. He just got loaded and he fell on his ass and he pulled out a gun and he held up a bar. If you can beat that in court, be my guest.
Q. And you know, as a fact, sir, from your position and expertise in administering LSD, that he did not have LSD?
A. Do I know?
Q. Yes.
A. I don't know. I wasn't there. I didn't hear about it. I didn't see about it until it came out in the newspaper, God knows, how long afterwards. And not for 15, 20 years later I didn't know, no, didn't know a thing about it. . . .

xxx

Q. Now, I marked this as the last exhibit on your deposition, Plaintiff's Exhibit 8, and that's the newspaper article you are referring to, isn't it (handing)?
A. That was one of them. There was another one in the San Jose newspapers. I didn't see anything until the last hearing we had, and you showed me this. I never saw the papers themselves. No, I never saw it. I didn't know anything about this guy until

approximately a year or two ago, when I was served with a subpoena.

Q. Isn't it a fact, Mr. Feldman, that in your group meeting after the Sunday paper appeared on December 22, you and your agents sat around the table and discussed the facts of what happened to the Deputy U.S. Marshal, whom you were all familiar with?

A. I wasn't familiar with him. I didn't know him. If he walked in, I would - - me and my agents, we never sat down and talked about this guy at all. This guy was history, as far as I was concerned, until I was served with a subpoena three months ago.

xxx

Q. But he was a Deputy U.S. Marshal.

A. You say he was. I don't know what he was.

Q. Are you telling me that your group sitting around was not interested in what happened to a Deputy U.S. Marshall who was stationed in the Post Office that you were visiting on a daily basis?

A. I was stating that as far as I'm concerned I was not there to interview him. I was there on a daily basis to get complaints, period, to have trials. I was at trials every day, every week, period, from federal judges on down. The U.S. Commissioner was over there, period. I didn't sit around and talk about this guy. If he did what he did, he was a nut. That's all I can tell you.

Q. Okay. But wasn't it of interest to you and your agents that a Deputy U.S. Marshal had gone into a bar and held it up?

A. No. It wasn't interesting to me. I didn't know about it . . .

Deposition of Ira Feldman, taken on February 7, 2003 ("2d Feldman Depo"), at 358-360

Plaintiff disingenuously argues that Feldman admitted giving LSD to plaintiff by taking a snippet of testimony out of context and inserting in brackets the words "[of LSD]" which Feldman never said. *See* Pltf's motion at 3 and note 5, citing 2nd Feldman Depo at 428-435. . . .

STATUTE AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Federal Tort Claims Act, 28 U.S.C. § 2674, in pertinent part provides:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

Federal Rule 50(a) of Civil Procedure entitled Judgment as a Matter of Law in Jury Trial . . .

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

Federal Rule 52 of Civil Procedure entitled Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule."

(c) **Judgment on Partial Findings:** If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding

on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Federal Rule 52(c)'s predecessor, Rule 41(b) provided:

(b) **Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).* Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

DEPOSITION OF DANIEL P. CASEY May 14, 2003

7

Q. BY MR. BENDER: Did you read PX 2, "Good Guy Fails As Bad Guy." In connection with the receipt of my letter, PX 1?

A. Yes, I did.

Q. Now, can you tell me whether or not you had read that article back in 1957?

A. Yes.

Q. And can you tell me - - describe for me, what was your reaction when you read the article?

A. I was shocked.

Q. And why was that?

A. Well, number one, I knew him from booking prisoners, and he seemed like a decent fellow, and I was shocked - - I would be shocked if any law enforcement officer did something like that.

xxx

33

Q. And was this a discussion between you and other agents?

A. Yes.

There was one other specific incidence. There was an agent by name of Jim Mulgannon.

Q. Could you spell that?

A. M-u-l-g-a-n-n-o-n.

And he had a prostitute informant. To my recollection, Feldman wasn't involved in this. And he took this individual up to the pad and, according to Jim, they tested some drugs on her, with her - - with her knowledge. That's the only information I have about a specific instance.